No. 94-66 JUL 11 1994

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In The

Supreme Court of the United States

October Term, 1994

MIKE MOORE, *et al.*,

Appellants,

v.

JOHNNY DUPREE, *et al.*,

Appellees.

On Appeal From The United States District Court For The Southern District Of Mississippi

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the district court was correct in holding on remand that the enactment in question (§ 47 of the Mississippi Uniform School Law of 1986) was not precleared under § 5 of the Voting Rights Act after the United States Attorney General failed to interpose any objection to any of the provisions of the Uniform School Law within sixty days of the State's submission, which clearly stated that the Act was being submitted "in its entirety"?

2. Whether the district court was correct in denying the joint motions of Defendants and Defendants/Intervenors for new trial, to alter or amend judgment and/or for a remedy?

3. After finding that the enactment at issue (§ 47 of the Mississippi Uniform School Law of 1986) was not precleared, to what extent does the district court have a duty to fashion a voting remedy?

4. In fashioning a voting remedy, should the district court take into account state statutes (other than the enactment in question) which have been precleared and which are, therefore, enforceable?

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

PARTIES TO THE PROCEEDING BELOW

The parties in the court below were:

Plaintiffs: Johnny Dupree, Jeff R. Bowman, Catherine Jones and Charlotte Tullos, individually and in their official capacities as members of the Board of Trustees of the Hattiesburg Public School District.

Defendants: Ray Mabus, in his capacity as Governor of Mississippi, Mike Moore, in his capacity as Attorney General of Mississippi, and the State of Mississippi.

Defendants/Intervenors: (1) Lamar County Board of Education and Trustees, in their official capacities. At the time the action was filed, the members of the Lamar County Board were Charles L. Cameron, Rita Downs, Tommy Graham, Fredie D. Howell and Dr. Johnny R. Purvis. Stephen High has replaced Rita Downs on the Board. (2) Forrest County School District and Members of its Board of Trustees, in their official capacities. At the time the action was filed, the members of the Forrest County Board were Bobby Patrick, Frank Myers, Mike Gilpin, John E. Clark and W. Larry Thompson. Terry Ryals has replaced Bobby Patrick on the Board.

Amicus Curiae: The United States was granted leave to participate as amicus curiae.

The Plaintiffs in the court below are the Appellees in this Court. The Appellants in this Court are the Defendants and the Defendants/Intervenors with the exception of Ray Mabus, former Governor of Mississippi, who was dismissed by the District Court and is not a party to this appeal.

PARTIES TO THE PROCEEDING BELOW – Continued

This Jurisdictional Statement is filed on behalf of Forrest County School District and Members of Its Board of Trustees, in their official capacities, and Mike Moore, in his capacity as Attorney General of Mississippi, and the State of Mississippi, only. The Lamar County Board of Education and Trustees in their official capacities are filing a separate jurisdictional statement. Even though these Appellants are filing a separate jurisdictional statement, they join in those arguments forwarded in the jurisdictional statement filed by the Lamar County Board of Education and Trustees.

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JOHNNY DUPREE, *et al.*,

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On Appeal From The United States District Court
For The Southern District Of Mississippi

JURISDICTIONAL STATEMENT

INTRODUCTION

The Appellants file this direct appeal from an Order of the United States District Court for the Southern District of Mississippi, dated April 13, 1994, denying the Appellants' joint motions for new trial, to alter or amend judgment and/or for a remedy. The Appellants challenge the Memorandum Opinion and Order dated August 27, 1993, holding that the repealer of MISS. CODE ANN. § 37-7-611 was not precleared by the United States Attorney General under § 5 of the Voting Rights Act and that said repealer is, therefore, ineffective and unenforceable.

REPORTED OPINIONS BELOW

Dupree v. Mabus, 776 F. Supp. 290 (S.D. Miss. 1991), *vacated and remanded, Dupree v. Moore*, 117 L.Ed.2d 609, 112 S.Ct. 1462, 60 U.S.L.W. 3651 (1992), *on remand, Dupree v. Moore*, 831 F. Supp. 1310 (S.D. Miss. 1993).

JURISDICTION

The District Court's Order denying the Appellants' joint motions for new trial, to alter or amend judgment and/or for a remedy was filed on April 13, 1994. A Notice of Appeal was filed on May 12, 1994. The District Court's Memorandum Opinion and Order from which Appellants sought relief in said motion was filed on August 27, 1993. A Notice of Interlocutory Appeal with regard to said Memorandum Opinion and Order was filed on September 24, 1993. The Court has jurisdiction of this appeal pursuant to 42 U.S.C. § 1973c, 28 U.S.C. § 1253, 28 U.S.C. § 2101 and 28 U.S.C. § 2106.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. § 1973c

This statute is reprinted in App. T, at 222a.

28 C.F.R. § 51.25 (1986)

This regulation is reprinted in App. U, at 224a.

28 C.F.R. § 51.35 (1986)

This regulation is reprinted in App. V, at 226a.

Miss. Code Ann. § 37-7-611 (1972)

This statute is reprinted in App. L, at 153a.

Miss. Code Ann. § 37-7-103 (1972)

Both the prior and amended versions of this statute are set forth in App. K, at 122a-123a.

STATEMENT OF THE CASE

Before 1986, Mississippi law provided for the existence of several types of school districts. The method by which the district lines of a school district could be altered depended upon the type of school district involved. For instance, MISS. CODE ANN. § 37-7-611 (1972) provided that areas annexed by a municipality would automatically be merged into any municipal separate school district existing within the annexing municipality. In effect, § 37-7-611 provided for the "hostile takeover" of students and tax base as a result of a municipal annexation.[1] In 1977, MISS. CODE ANN. § 21-1-59 was amended to provide an exception to § 37-7-611 by providing that any annexation of a municipality across county lines would not affect the school district in the annexed area unless such school district gave its consent for the annexed territory to be included in the municipal separate school district. In 1978, § 21-1-59 was again amended to extend the exception to situations in which a municipality was

[1] The potential adverse effect of this provision on county school districts surrounding municipal separate school districts is best demonstrated by the fact that the City of Hattiesburg, Mississippi, home of Appellees in this appeal, has annexed surrounding territory on six different occasions since 1966. These annexations occurred in 1966, 1979, 1981, 1982, 1985 and 1989.

annexing *further* into a county other than its own county. The 1978 amendment also provided for referendums in specific situations.

In 1986, the Mississippi legislature enacted the Mississippi Uniform School Law of 1986 [hereinafter referred to as "Uniform School Law" or "the Act"],[2] which was, among other things, "an act to provide that all public school districts in the state of Mississippi shall have a common system of administration." Part of the uniformity resulting from the Act was the creation of one type of school district, as opposed to several, as well as the provision for one method by which school district lines could be altered. To make way for this uniformity, § 37-7-611, as well as 22 other statutes dealing specifically with the creation and operation of municipal school districts, was repealed by § 47 of the Uniform School Law.[3] Section 37-7-611, which had provided for the automatic merging, hostile or otherwise, of territory into a municipal separate school district upon annexation, was replaced by § 52 of the Act, which amended MISS. CODE ANN. § 37-7-103 to provide for the single method by which any school district could change its boundaries. The amended MISS. CODE ANN. § 37-7-103 provided that all school districts in Mississippi would have the same power to move district lines, but only with the consent of the school districts involved. It replaced all conflicting provisions regarding the movement of school district lines. No party contends that the amendment to

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[2] Senate Bill No. 2117, ch. 492, Laws of Mississippi, 1986 Regular Session.

[3] Uniform School Law, ch. 492, § 47, 1986 Miss. Laws 687.

§ 37-7-103 (§ 52 of the Uniform School Law) was not properly submitted and precleared by the United States Attorney General [hereinafter "USAG"] under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

After the Uniform School Law was enacted and signed by the Governor, it was submitted in its entirety to the USAG for preclearance under § 5 of the Voting Rights Act on July 22, 1986. It was received by the U.S. Department of Justice on July 23, 1986. The submission stated:

> This submission is cited as the 'Mississippi Uniform School Law of 1986' and is submitted to the Attorney General of the United States *in its entirety*. . . . For the sake of brevity, the submission will only set forth the particular sections which deal *primarily* with voting rights even though *the complete act is submitted for review.*

(See Appendix J at 81a) (emphasis added). The cover memorandum stated the purpose of the Act as follows:

> The changes set forth in Senate Bill Number 2117 were made as part of a comprehensive reorganization and restructuring of the laws governing the administration and operation of the public schools of Mississippi. Further, the act grants to the governing boards of the school districts a measure of fiscal independence to meet the funding needs of each respective district. Mississippi schools currently operate under four different kinds of school district with each district having its own system of government and finance. It appears that if there were only one type of district so that all laws pertaining to districts would apply to each district in the state, rather than special laws for special

> types of districts, the administration and operation of school districts would be more effective and beneficial to the state.

(See Appendix J at 89a-90a).

The cover memorandum also explained 13 sections of the Uniform School Law, including § 52, the replacement for MISS. CODE ANN. § 37-7-611 which was repealed by § 47 of the Uniform School Law. Regarding § 52, the submission memorandum stated:

> Section 52 amends Section 37-7-103 . . . [and] sets forth that . . . the school board of any school district may abolish such existing district or reorganize, change or alter the boundaries of any such district. Additionally, the school board with the consent of the school board of the district involved may add to such school district any part of the school district adjoining same or may detach territory from such school district and annex same to an adjoining district. The present law enables the county board of education to create, alter or abolish any school districts of such county, other than the municipal separate school districts. In addition, the county board of education with the consent of the board of trustees of the municipal separate school district involved may add to such municipal separate school districts any part of the county adjoining same or may detach territory from such municipal separate school district and annex same to an adjoining district in the county school system.

(See Appendix J at 83a).

Along with the submission and cover memorandum, the State included a large loose-leaf notebook which was

entitled "Senate Bill 2117 – Comparison of Current Law and New Law." It compared each section of the Act with prior law. The booklet's introduction stated:

> This booklet sets forth on a section by section basis each section of the current law which has been amended followed by each individual section of Senate Bill Number 2117, Laws of Mississippi, 1986 Regular Session. Where the sections of Senate Bill Number 2117 are new law then only those particular sections will be denoted with no comparison of current law. This section by section comparison provides explanatory materials adequate to disclose the difference between the prior and the proposed law. Each section of Senate Bill Number 2117 which is the version of the bill as sent to the governor is marked to show the changes made in the current law. Underlining indicates language added and a check mark indicates language deleted. By comparing each section of Senate Bill Number 2117 and the current practice, the changes to current law are easily identified.

(See Appendix K at 93a). The loose-leaf booklet noted that § 47 of the Act provided for the repeal of § 37-7-611 as well as 22 other sections "which provide for the creation and operation of municipal separate school districts." (See Appendix K at 121a). The regulations in effect at the time did not require that a copy of the repealed law be provided with the submission. 28 C.F.R. § 51.25 (1986).[4] In addition, the regulations in effect at the time

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[4] The regulations have since been changed to require the State to submit a copy of the prior law being amended or repealed. *See* 28 C.F.R. § 51.27 (1994).

provided that "[i]f a submission does not satisfy the requirements of § 51.25, the Attorney General *shall* request such further information as is necessary from the submitting authority and advise the submitting authority that the 60-day period will not commence until such information is received by the Department of Justice." 28 C.F.R. § 51.35 (1986) (emphasis added).[5]

On August 29, 1986, the USAG informed the Mississippi Attorney General [hereinafter referred to as "MAG"] that he did "not interpose any objection to the voting changes occasioned by Senate Bill No. 2117 (1986), as identified in your July 22, 1986, letter." (See Appendix M at 156a). The USAG did not request any additional information regarding Senate Bill No. 2117, nor did he state any objection to any provisions of the bill during the 60 days within which he was allowed to do so by § 5 of the Voting Rights Act and the applicable federal regulations.[6]

Because of confusion regarding the language used by the USAG in its preclearance of Senate Bill No. 2117, the MAG sought an affirmative preclearance of § 47 (the

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[5] The regulations have since been changed to provide that the Attorney General "may" request additional information. *See* 28 C.F.R. § 51.37 (1994).

[6] The regulation governing computation of time, 28 C.F.R. 51.8 (1986), provided that the 60-day period within which the USAG could interpose an objection would begin running upon receipt of the submission by the Department of Justice. According to the regulation's method of computation, the USAG's opportunity to object to the repeal of § 37-7-611 ended as of September 22, 1986. This regulation is currently codified at 28 C.F.R. § 51.9 (1994).

repealer of § 37-7-611) on December 30, 1987. In its submission, the State stated that it "hereby expressly reserves and does not waive any and all objections it may have concerning whether the instant submission is subject to the preclearance requirements of Section 5." (See Appendix N at 160a). On February 28, 1988, the USAG requested additional information concerning the repeal of § 37-7-611 (see Appendix O at 169a) and, after the State responded several months later (see Appendix P at 174a), the USAG interposed an objection to the repealer of § 37-7-611 for the first time on March 31, 1989. (See Appendix Q at 183a). The State requested reconsideration on January 12, 1990, and the USAG affirmed its objection on May 25, 1990. (See Appendices R and S at 187a and 217a).

The plaintiffs subsequently filed suit in the United States District Court for the Southern District of Mississippi to enjoin enforcement of the 1977 and 1978 amendments to Miss. Code Ann. § 21-1-59 and the 1986 repealer of Miss. Code Ann. § 37-7-611, claiming that none of the three enactments had been properly precleared under § 5 of the Voting Rights Act. On April 2, 1991, the three-judge court below granted summary judgment to plaintiffs on their claims that the 1977 and 1978 amendments to § 21-1-59 were not precleared and were not enforceable.[7]

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[7] The 1977 amendment to § 21-1-59 was not specifically submitted to the USAG for preclearance until March 23, 1990. The 1978 amendment to § 21-1-59 was submitted for preclearance in April 1978. The plaintiffs claimed before the lower court that the 1978 submission only referred to the referendum provisions and did not identify the voting changes in question, thereby failing to submit those changes for preclearance. In March 1981, the USAG notified the MAG that it interposed no objection to the 1978 submission.

However, at the same time, the lower court awarded summary judgment to defendants and intervenors on the plaintiffs' claim that the repealer of § 37-7-611 had not been precleared and was not enforceable. That ruling was based on the court's finding that § 47 of the Act had been submitted for preclearance in July 1986 and was precleared when the USAG failed to interpose an objection or request additional information within 60 days. (See Appendix F at 70a-71a).

The plaintiffs appealed the ruling with regard to the repealer of § 37-7-611 to this Court. On March 23, 1992, this Court vacated the three-judge court's judgment and remanded the case for further consideration in light of *Clark v. Roemer*, 500 U.S. 646, 111 S. Ct. 2096, 114 L. Ed. 2d 691 (1991). (See Appendix G at 74a). On remand, the lower court reversed its earlier ruling with regard to the

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On May 25, 1990, the USAG noted an objection to the 1977 amendment of § 21-1-59 and also notified the MAG that the portion of the 1978 amendment dealing with the extension of school districts further into neighboring counties had not been precleared. (See Appendix S at 217a). On April 2, 1991, the three-judge court, in its initial opinion, granted summary judgment to plaintiffs on their claims that the 1977 and 1978 amendments to § 21-1-59 had not been precleared and were, therefore, unenforceable. That ruling was never appealed and is not now before this Court.

The effect of the lower court's April 2, 1991 ruling with regard to the 1977 and 1978 amendments to § 21-1-59 was insignificant, since the court found at the same time that the repealer of § 37-7-611 had been properly precleared and was enforceable. Likewise, all parties agree that § 52 of the Act (providing, like the 1977 and 1978 amendments to § 21-1-59, for the movement of school district lines only by consent of the districts involved) was precleared.

repealer of MISS. CODE ANN. § 37-7-611 and found that said repealer had not been precleared by the USAG and was, therefore, ineffective and unenforceable. Judge Barksdale, of the Fifth Circuit, dissented. (See August 27, 1993 Memorandum Opinion and Order at Appendix B).

The defendants and defendants/intervenors then appealed to this Court the lower court's ruling on remand with regard to the repealer of § 37-7-611. (See Notice of Interlocutory Appeal at Appendix E). In their response to the defendants' and defendants/intervenors' Jurisdictional Statement, the plaintiffs argued that said issues were not ripe for appeal, since the district court had not at that time ruled on joint post-judgment motions filed by the defendants and defendants/intervenors. This Court, presumably agreeing with the plaintiffs' position, dismissed the appeal for want of jurisdiction. *Moore v. Dupree*, 127 L.Ed.2d 69, 114 S.Ct. 872, 62 U.S.L.W. 3470 (1994). (See Appendix I).

On April 13, 1994, the district court denied the defendants' and defendants/intervenors' joint post-judgment motions for new trial, to alter or amend judgment and/or for a remedy. (See Order at Appendix A). These issues now being ripe for this Court's consideration, the defendants and defendants/intervenors now appeal the district court's Order denying the joint motions for new trial, to alter or amend judgment and/or for remedy, as well as the August 27, 1993 Memorandum Opinion and Order on remand.

ARGUMENT

I. THE QUESTION IS SUBSTANTIAL. THE DISTRICT COURT'S DECISION ON REMAND CONFLICTS WITH DECISIONS OF THIS COURT REGARDING THE FINALITY OF PRECLEARANCE ONCE THE UNITED STATES ATTORNEY GENERAL FAILS TO OBJECT TO A COMPLETE SUBMISSION IN A TIMELY MANNER.

A. The lower court's initial April 2, 1991 decision correctly applied the law.

In its April 2, 1991 decision, the three-judge panel below correctly applied decisions of this Court and others in finding that the repealer of § 37-7-611 was precleared once the Uniform School Law was submitted to the USAG in its entirety and the USAG failed to interpose an objection or request additional information within sixty (60) days. In so finding, the three-judge court relied on this Court's decision in *Morris v. Gressette*, 432 U.S. 491, 97 S. Ct. 2411, 53 L. Ed. 2d 506 (1977). In *Morris*, the Court held that the USAG's objection to a South Carolina reapportionment plan more than sixty days after submission was invalid. The Court stated:

> According to the terms of § 5, a covered jurisdiction is in compliance pursuant to the latter alternative [USAG method] once it has (i) filed a complete submission with the Attorney General, and (ii) received no objection from that office within 60 days. . . . [C]ompliance with § 5 is measured solely by the *absence*, for whatever reason of a timely objection on the part of the Attorney General.

432 U.S. at 502 (emphasis in original). The Court noted that compliance was "not conditioned on an affirmative statement by the Attorney General that the change is without discriminatory purpose or effect." *Id.* at 502. The Court then went on to state:

> In light of the potential severity of the § 5 remedy, the statutory language, and the legislative history, we think it clear that Congress intended to provide covered jurisdictions with an expeditious alternative to declaratory judgment actions. The congressional intent is plain: the extraordinary remedy of postponing the implementation of validly enacted state legislation was to come to an end when the Attorney General failed to interpose a timely objection based on a complete submission. Although there was to be no bar to subsequent constitutional challenges to the implemented legislation, there also was to be no 'dragging out' of the extraordinary federal remedy beyond the period specified in the statute. [Citation omitted] *Since judicial review of the Attorney General's actions would unavoidably extend this period, it is necessarily precluded.* [Footnote omitted].

Id. at 504-05 (emphasis added). The Court noted that where discriminatory impact of a statute is not detected by the USAG, it can be challenged in subsequent traditional constitutional litigation, "[b]ut it cannot be questioned in a suit seeking judicial review of the Attorney General's exercise of discretion under Section 5, *or his*

failure to object within the statutory period." Id. at 507 (emphasis added).[8]

In its April 2, 1991 decision, the three-judge court also relied on *Woods v. Hamilton,* 473 F. Supp. 641 (D.S.C. 1979). In *Woods,* the court considered a South Carolina Home Rule Act which authorized the holding of referendums by counties to determine a form of government, transferred substantial powers to the counties and mandated the assumption (either by choice or inaction) of particular forms of government by counties. *Id.* at 644-645. In submitting the Act to the USAG for preclearance, the South Carolina Attorney General's office forwarded a cover letter quoted in full as follows:

> For your consideration under the Voting Rights Act submitted herewith are certified copies of the following Act enacted by the General Assembly and approved by the Governor.
>
> | *Ratification Number* | *Date Approved* |
> |---|---|
> | R396 | June 25, 1978 |
>
> We would request expeditious consideration of this Act. If additional information is needed, please contact me.

Id. at 644. The court found that "[i]t is apparent from the above letter that the State submitted the *entire* Home Rule

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[8] In addition to the availability of traditional constitutional litigation, other safeguards are available to check potential discrimination with regard to the enactments in question in the instant case. Any municipal annexation in Mississippi, the event which previously triggered § 37-7-611 and is now affected by its repealer, must be precleared by the USAG to determine not only the annexation's impact on voting in matters regarding schools, but the impact on voting in all other matters as well.

Act to the United States Attorney General for his consideration within the 60-day statutory period." *Id.* at 644. In responding to the State's submission, the USAG expressly failed to object to the holding of a referendum, "attempted to reserve the right to object to the implementation in the counties of the several forms of government" and "made no mention of the transfer of powers." *Id.* at 645. The three-judge court in *Woods* relied on *Morris v. Gressette, supra,* and found that the USAG's failure to object to any part of the Act was tantamount to approval and that the entire act was precleared. 473 F. Supp. at 645.

In *Woods,* the court stated:

> Here, the Attorney General's silence on the transfer of powers in the Home Rule Act clearly dooms his belated attempt to label the assumption of such powers by the county council as an 'uncleared change.' Whatever may have been the motive of the Attorney General in failing to object to the transfer of powers in his . . . letter, the fact remains that the State submitted the entire Home Rule Act and, under the law, the Attorney General . . . was required to pass on all components of a complete submission at that time.

Id. at 646. In *Woods,* the fact that the South Carolina Attorney General submitted "this Act" was deemed sufficient to put the USAG on notice that the entire Act was being submitted for preclearance. In the instant case, the scope of the MAG's submission is even more unambiguous, since it stated that the Act was being submitted "in its entirety" and that "the complete Act is submitted for review."

In its initial decision, the three-judge court then went on to distinguish *Allen v. State Board of Elections*, 393 U.S. 544 (1969), *United States v. Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110 (1978), and *McCain v. Lybrand*, 465 U.S. 236 (1984), all of which are cases relied on by the plaintiffs in this action. In *Allen*, the voting changes in question were never formally submitted to the USAG, but the appellees in that case contended the USAG had become aware of the changes when he was served with a copy of the appellees' briefs in four consolidated cases. The Court correctly rejected the argument that a "submission" has been made when "the Attorney General merely becomes aware of the legislation, no matter in what manner. . . . " 393 U.S. at 571. In *Sheffield*, the City submitted correspondence seeking approval only for the holding of a referendum, but did not request preclearance of the underlying voting change that was the subject of the referendum. The Court again correctly found there was no preclearance since the voting change itself was never submitted.

In *McCain*, the Court found that preclearance of a submitted enactment did not serve as preclearance of prior amendments to the enactment which were independently subject to preclearance themselves but which had never been submitted. In its April 2, 1991 decision, the three-judge panel below correctly applied *McCain* to the 1977 amendment of MISS. CODE ANN. § 21-1-59, which it held was not precleared by virtue of the preclearance of the later 1978 amendment. However, the repealer of § 37-7-611 did not involve attempts to preclear a prior amendment pursuant to the submission of a later amendment. The Court found the repealer of § 37-7-611 was

clearly submitted to the USAG as part of the Uniform School Law, which was submitted in its entirety.

The lower court summed up its finding in its April 2, 1991 decision when it stated:

> *Allen, Sheffield,* and *McCain,* however, are factually distinguishable from this case. The MAG unambiguously submitted the Uniform School Law 'in its entirety.' The USAG was advised that only particular sections which dealt 'primarily' with voting rights were discussed, 'even though the complete act is submitted for review.' The memorandum explained the comprehensive nature of the submission; and, most importantly, the booklet explained the repeal of § 37-7-611 governing the creation and operation of municipal school districts.
>
> Of even greater significance is both the discussion of § 52 in the cover memorandum and booklet and the undisputed preclearance of that section. Section 52, § 37-7-103, was in effect a replacement for the school districting procedures. Prior to the Uniform School Law, the provisions pertaining to school district boundaries and alterations varied, depending on whether the district was a county, municipal or consolidated school district. The 1986 Uniform School Law created uniformity among the school districts. (Footnote omitted) Section 52 amended § 37-7-103 (which had concerned changes to school districts by a county board of education) by granting jurisdiction to the school board of *any* school district to alter the boundaries of *any* such district by obtaining the consent of the adjoining school district involved; and the school board was authorized 'to detach

> or add to such school district any part of the school district adjoining same, and . . . may detach territory from such school district and annex same to an adjoining district.' All references to a county board of education and its authority to alter districts in the county were deleted; all references to a municipal school district and its required consent were deleted.

Appendix F at 68a-69a.

The lower court's initial finding was correct in light of the *McCain* decision, which clearly stated it is the *scope* of the preclearance request that must not be ambiguous. In *McCain*, the Court stated that "to the extent there was any ambiguity in the *scope* of the preclearance request, the structure and purpose of the preclearance requirement plainly counsel against resolving such ambiguities in favor of the submitting jurisdiction in the circumstances of this case." 465 U.S. at 257 (emphasis added). The scope of the MAG's submission was not ambiguous since he clearly stated that the Uniform School Law was being submitted "in its entirety" and that "the complete Act is submitted for review."

B. The district court should have distinguished *Clark v. Roemer*, 500 U.S. 646, 111 S. Ct. 2096, 114 L. Ed. 2d 691 (1991), on remand.

After plaintiffs appealed the lower court's April 2, 1991 decision, this Court vacated that decision and remanded the matter back to the three-judge panel for consideration in light of *Clark v. Roemer*. (See Appendix G). On remand, the three-judge court, with Judge Barksdale of the Fifth Circuit dissenting, reversed its earlier

decision and found that the repealer of § 37-7-611 had not properly been submitted by the State of Mississippi to the USAG for preclearance and that said repealer was, therefore, ineffective and unenforceable. (See Memorandum Opinion and Order on remand at Appendix B). The Appellants contend on appeal that the lower court should have distinguished *Clark v. Roemer* factually, just as it distinguished *McCain v. Lybrand* in its initial decision. Judge Barksdale, in his dissent, agreed when he stated "*Clark* and its precursor, *McCain v. Lybrand*, 465 U.S. 236 (1984), both involve a State's failure to submit a specifically identifiable preclearance request and are therefore factually distinguishable from this case." (Appendix B at 25a-26a). Judge Barksdale added:

> The Court [in *Clark*] emphasized that in order to minimize the administrative burden on the USAG, the State 'must identify with specificity each change that it wishes the Attorney General to consider'; it also repeated that 'any ambiguity in the scope of the preclearance request must be resolved against the submitting authority'. *Id.* Accordingly, the Court did not alter the standard for § 5 preclearance requirements; rather, it reiterated the principles stated in *McCain*, and emphasized the need to maintain 'the efficacy of administrative preclearance under § 5'. *Clark*, 111 S.Ct. 2102.

Appendix B at 27a (bracketed material added).

Clark involved a challenge under § 5 to the validity of Louisiana's electoral scheme for certain judicial posts. After the *Clark* plaintiffs filed an amended complaint in 1987 alleging that several statutory and constitutional changes with regard to the election of Louisiana judges

had not been precleared under § 5, Louisiana submitted all of the changes in question to the United States Attorney General for preclearance. In September 1988 and May 1989, the USAG granted preclearance for some of the submitted changes, but objected to other changes, including the creation of certain judgeships. In June 1990, Louisiana asked the USAG to reconsider his objection to preclearance of those judicial seats and proceeded with plans to hold elections in the fall of 1990. The petitioners then sought to enjoin the elections for those unprecleared judicial positions; however, the district court refused to enjoin the elections, even though the USAG had interposed objections, the validity of which were not questioned. 111 S. Ct. at 2099.

In October 1990, the three-judge district court in *Clark* gave a final ruling with regard to the status of the unprecleared judgeships, dividing those judgeships into two categories. The first category involved at-large judgeships in districts where Louisiana had obtained preclearance for later-created judgeships, but not the earlier-created judgeships in question. With regard to these, the district court held that the USAG had precleared the earlier judgeships by virtue of his preclearance of the later, related voting changes. 111 S. Ct. at 2100. The second category which the district court recognized involved judgeships to which the U. S. Attorney General had issued valid objections. Despite the fact that the validity of the USAG's objections was not called into question, the district court refused to enjoin elections for those positions because it found that "the potential harm to all of the citizens of Louisiana [from such an injunction] outweigh[ed] the potential harm, if any, of allowing

the elections to continue." *Id.* (citing district court opinion, 751 F. Supp. at 595).

In considering the facts of *Clark*, the United States Supreme Court resolved two distinct issues. The Court stated:

> The case presents two discrete issues under § 5 of the Voting Rights Act. First, we must decide whether the District Court erred by not enjoining elections held for judgeships to which the Attorney General interposed valid § 5 objections. Second, we must determine whether the State's failure to preclear certain earlier voting changes under § 5 was cured by the Attorney General's preclearance of later, or related, voting changes.

111 S. Ct. at 2101.

First, the Court determined that the district court erred in refusing to enjoin elections for judgeships to which the USAG had interposed valid and timely § 5 objections. 111 S. Ct. at 2101-02. The Court then held that the USAG's preclearance of voting change legislation in certain districts did not operate to preclear earlier voting changes in those districts which were themselves independently subject to § 5, but which had never been specifically submitted for preclearance. 111 S. Ct. at 2202-05.

Neither of these findings is inconsistent with the lower court's April 2, 1991 opinion in the instant case. In the instant case, unlike *Clark*, the lower court did not consider USAG objections which were unchallenged as to timeliness and validity. On the contrary, the lower court initially found that the USAG's objection in the instant case was neither timely filed nor valid, having been made

more than sixty days after the submission. No such allegations were made in *Clark*. With regard to the second category of changes considered in *Clark*, the United States Supreme Court's finding is again consistent with the lower court's April 2, 1991 opinion in the instant case. In *Clark*, the United States Supreme Court applied *McCain v. Lybrand* and found that preclearance of current voting changes did not serve to preclear earlier, unsubmitted voting changes. Likewise, the lower court, in its April 2, 1991 opinion, applied *McCain* in finding that the 1977 amendment to MISS. CODE ANN. § 21-1-59 was not precleared by virtue of the USAG's approval of the 1978 amendment to the same statute. However, the repealer of § 37-7-611, which was clearly submitted for preclearance as part of the new law, was correctly found to be precleared.

Judge Barksdale, in his dissent on remand, agreed when he stated:

> Unlike *McCain*, Mississippi submitted the repealer as part of its initial submission; therefore, the repealer defined the scope of that part of the request. Moreover, Mississippi specifically identified the repealer as a *current* change; unlike *McCain* and *Clark*, it was not a prior, uncleared change presumably encompassed by the submission of a current change. (Footnote omitted)

Appendix B at 29a.

The dissenting opinion on remand further stated:

> Accordingly, the submission specifically identified both the repealer and the replacement. And, as should have been clear to the

USAG, through review of the identified sections, a new, single procedure was replacing, *inter alia*, the prior procedure for municipal separate school districts, one of which was their automatic expansion into annexed areas. Therefore, what more *should – not could –* have been done?. . . .

. . . .

Here, however, the submission of the repealer meets the requisite level of specificity; it did not impose an administrative burden of the same quality and magnitude as that at issue in *Clark* – far from it. As discussed, Mississippi specifically identified the submitted change. The State did not impose upon the USAG the added responsibility of conducting independent research to locate an unprecleared prior or related change not identified in the submission. The booklet specifically identifying the repealer accompanied the cover memorandum. No doubt, the State *could* have been *more* helpful by including the text of the repealed statute; however, the regulations then in effect *did not require* covered jurisdictions to submit a copy of the prior law being amended or repealed. 28 C.F.R. § 51.25 (1986). (Footnote omitted) *See* 776 F. Supp. at 300. And, no doubt, it *could* have been even more helpful by describing how the § 37-7-611 automatic municipal school district expansion procedure repealed by § 47 of the Uniform School Law was one of the procedures replaced by the procedure established by § 52 of that law. *See* 776 F. Supp. at 302-03. (Footnote omitted) The test, however, is not whether the State was as helpful as, with 20-20 hindsight, it could have been, but whether it put the USAG

> on notice that the repealer was submitted for preclearance. I would hold, as the court did in *Dupree I*, that the State satisfied that test.

Appendix B at 32a-34a.

In conclusion, the three-judge panel, on remand, should have distinguished *Clark*, just as it distinguished *McCain v. Lybrand* in its initial decision. Not only is *Clark* distinguishable factually from the instant case, but the general principles enunciated in *Clark* with respect to a submitting jurisdiction's obligations are a reiteration of principles already enunciated in *McCain*. Those principles were correctly considered and applied by the lower court in its initial decision.

C. The undisputed preclearance of § 52 controls.

Regardless of the outcome of the challenge to the repealer of § 37-7-611, the fact remains that § 52 of the Uniform School Law, including the amended MISS. CODE ANN. § 37-7-103 which was intended to replace § 37-7-611, was indisputably precleared. Under § 37-7-103, municipal school districts may only move their district lines by permission of the county school district affected. Even if the repealer of § 37-7-611 is found not to have been precleared, by implication or otherwise, the result of such a finding would be that two equally valid, but conflicting statutes (§ 37-7-611 and § 37-7-103) are in existence. The Mississippi Supreme Court resolved such a conflict between the two statutes, using principles of statutory construction, by recognizing § 37-7-103 as the most recent

legislative expression. *Greenville Pub. School Dist. v. Western Line Pub. School Dist.*, 575 So. 2d 956, 963 (Miss. 1990), *cert. denied*, 117 L. Ed. 2d 649 (1991).

It is well-established that interpretations of state law by a state's highest court are binding on federal courts. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983) ("the views of the state's highest court with respect to state law are binding on the federal courts"); *Brown v. Ohio*, 432 U.S. 161, 167 (1977) ("Ohio courts 'have the final authority to interpret . . . that state's legislation.' "). As the three-judge panel noted in its April 2, 1991 opinion, "the Mississippi Supreme Court's interpretation of the Uniform School Law is binding on this court." Appendix F at 60a.

The lower court has not yet recognized that § 37-7-103 must supersede § 37-7-611 as enunciated by the Mississippi Supreme Court. While the district court attempted to summarily dispel the Appellants' argument with regard to the effect of § 52's preclearance on remand (see Appendix B at 21a), it has not satisfactorily explained how implementation of an indisputably precleared, enforceable statute (§ 52) can be enjoined simply because the repealer of an inconsistent statute was not precleared. The Appellants contend that it cannot.

II. AFTER FINDING THAT § 47 HAS NOT BEEN PRECLEARED, THE DISTRICT COURT IS REQUIRED TO FASHION A VOTING REMEDY AND, IN DOING SO, SHOULD TAKE INTO ACCOUNT OTHER MISSISSIPPI STATUTES WHICH WERE INDISPUTABLY PRECLEARED AND WHICH ARE, THEREFORE, ENFORCEABLE.

In its August 27, 1993 Memorandum Opinion and Order, the district court found that the repealer of

§ 37-7-611 was "ineffective and unenforceable," but failed to adopt a specific remedy outlining the relief to which the plaintiffs were entitled. (Appendix B at 22a). The absence of a specific remedy caused a significant degree of confusion as to the effect of the court's ruling. It was unknown by the parties whether the court's ruling meant that the boundaries of the Hattiesburg Public School District would automatically be expanded to encompass the annexed territories, or whether the district court would leave those boundaries as they were and adopt a specific *voting* remedy precluding voters in certain areas from voting in elections affecting school board officials.

Because of the resulting confusion and its detrimental impact on the administrative operations of the affected school districts, the defendants and defendants/intervenors filed joint motions for a new trial, to alter or amend order, and for a specific remedy on September 13, 1993. (See Appendices W and X at 227a and 233a). In those motions, the defendants and defendants/intervenors asked the district court to reopen its Order to take additional testimony and evidence which would enable it to enact a specific, equitable voting remedy. The district court summarily denied the joint motions of the defendants and defendants/intervenors on April 13, 1994. (See Appendix A).[9]

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[9] On February 11, 1994, the Forrest County School District supplemented the Joint Motion for Remedy to request an order by the district court providing that any specific voting remedy adopted would not go into effect until after the 1994-95 school year. (*See* Appendix Y at 240a). The supplemental motion was filed because Mississippi law requires school districts to notify all teachers by April 8 if their contract will not be renewed for

Having held that the repealer of § 37-7-611 had not been precleared, the district court was under a duty to fashion a specific voting remedy to afford the plaintiffs' relief. In *McCain v. Lybrand*, this Court stated:

> The only questions in an action alleging a violation of the § 5 preclearance requirement are (1) whether a change is covered by § 5, (2) if the change is covered, whether § 5's approval requirements have been satisfied, and (3) *if the requirements have not been satisfied what relief is appropriate.*

465 U.S. at 250 n.17 (citing *Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983)) (emphasis added). Elaborating further on the district court's duty to fashion a specific voting remedy, this Court stated further in *McCain v. Lybrand:*

> Nor is there any question that the Act was required to be submitted for preclearance – the parties have stipulated that submission was required. Given this stipulation, the parties understandably have made little effort to define precisely the nature of the changes in election practices made by the Act which required preclearance, but the briefing indicates that the parties agree that the at-large residency requirement voting scheme constituted such a change. While this matter may be more fully

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the following school year. The instant litigation had caused confusion as to how many and which teachers would be renewed for the 1994-95 school year, and the affected school districts were required to make such a decision by April 8, 1994. The Forrest County School District's supplemental motion was denied in the district court's April 13, 1994 Order.

> explored in future proceedings after remand, several changes are suggested: the different terms of office for Council members in comparison with the former Board, the basic reallocation of authority from the state legislative delegation to the Council, the shift from two appointed Board positions to at-large election of their Council counterparts, and the residency requirement applicable to all members of the Council.

465 U.S. at 250 n.17. The Court clearly emphasized the duty to adopt specific voting remedies by making such suggestions.

In *Clark v. Roemer,* this Court reaffirmed the district court's duty to fashion a specific remedy when it stated:

> "[A] local district court is in a better position than this Court to fashion relief, because the district court 'is more familiar with the nuances of the local situation' *and has the opportunity to hear evidence." Hathorn v. Lovorn,* 457 U.S., at 270, 102 S.Ct., at 2431, quoting *Perkins v. Matthews,* 400 U.S., at 397, 91 S.Ct., at 441. In fashioning its decree granting relief, the district court should adopt a remedy that in all the circumstances of the case implements the mandate of § 5 in the *most equitable and practicable manner and with least offense to its provisions.*

111 S.Ct. at 2105 (emphasis added).

In *Dotson v. City of Indianola,* 521 F. Supp. 934 (N.D. Miss. 1981), *aff'd,* 455 U.S. 936, 102 S.Ct. 1424, 71 L.Ed.2d 646 (1982), the district court considered a remedy in a case wherein a municipal annexation had not been properly precleared. The district court did not "de-annex" the territory involved, but simply fixed "the legal boundaries

for voting purposes." 521 F. Supp. at 944 (emphasis added). *Dotson* represents the type of specific voting remedy called for in a § 5 preclearance case, the court in that case appropriately adopting specific remedies and limiting those remedies to voting matters.

The district court's failure to adopt a remedy in the instant case, as required by law, has caused a chaotic set of circumstances to develop. The effect of the court's August 27, 1993 ruling is not clear.[10] In the meantime, the affected school districts have prepared for the upcoming school year with more than a little uncertainty and confusion. While it is not the role of this Court to adopt a specific voting remedy, the Appellants maintain that, in the event the district court's finding that § 47 was not properly precleared is upheld, then the district court should be ordered to accept additional evidence and testimony and, subsequently, to adopt a specific voting remedy "in the most equitable and practicable manner and with least offense to its [§ 5's] provisions." *Clark*, 111 S.Ct. at 2105. As discussed more fully in section I(C) of this argument, any remedy adopted by the district court should take into account the enforceability of MISS. CODE ANN. § 37-7-103 (§ 52 of the Act), which all parties agree was precleared.

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[10] The Hattiesburg Public School District has filed a motion to modify its desegregation order in the desegregation suit under which it operates, requesting the court to move its school district lines to encompass the disputed territories. *United States v. Pittman*, No. 4706 (S.D. Miss.). No decision has been made with regard to said motion.

CONCLUSION

For these reasons, probable jurisdiction should be noted.[11]

Respectfully submitted,

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July 11, 1994

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[11] These Appellants also join in the arguments forwarded in the Jurisdictional Statement filed by the Lamar County Board of Education and Trustees.

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI HATTIESBURG DIVISION

JOHNNY DUPREE, et al. PLAINTIFFS

VS. CIVIL ACTION NO. H90-0043(W)

MIKE MOORE, et al. DEFENDANTS

AND

THE LAMAR COUNTY BOARD OF EDUCATION DEFENDANTS/INTERVENORS

AND

FORREST COUNTY SCHOOL DISTRICT, et al. DEFENDANTS/INTERVENORS

ORDER

(Filed April 13, 1994)

Before the three-judge panel are the joint motions of the defendants in the above-styled and numbered cause for new trial, to alter or amend judgment, and/or for a remedy to be fashioned in accordance with certain administrative concerns of the defendants, and this court, having reviewed said motions, the supplemental documents, and the briefs of the parties, finds said motions not well taken, and the same are hereby denied.

SO ORDERED AND ADJUDGED, this the 12th day of April, 1994.

/s/ Rhesa Barksdale
RHESA BARKSDALE
UNITED STATES CIRCUIT JUDGE

/s/ Tom S. Lee
TOM S. LEE
UNITED STATES DISTRICT JUDGE

/s/ Henry T. Wingate
HENRY T. WINGATE
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

JOHNNY DUPREE, ET AL.	PLAINTIFFS
vs.	
MIKE MOORE, ATTORNEY GENERAL OF MISSISSIPPI, IN HIS OFFICIAL CAPACITY, AND THE STATE OF MISSISSIPPI	DEFENDANTS
and	
THE LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, IN THEIR OFFICIAL CAPACITIES	DEFENDANTS/ INTERVENORS
and	
FORREST COUNTY SCHOOL DISTRICT AND THE MEMBERS OF THE BOARD OF TRUSTEES IN THEIR OFFICIAL CAPACITIES	DEFENDANTS/ INTERVENORS

Civil Action No. H90-0043(W)

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

(Filed Aug. 27, 1993)

Before BARKSDALE, Circuit Judge, and LEE and WINGATE, District Judges.

MEMORANDUM OPINION AND ORDER

Back before this three-judge court pursuant to a remand by the United States Supreme Court, this lawsuit highlights the question under *Clark v. Roemer*, 500 U.S. ___, 111 S.Ct. 2096, 114 L.Ed.2d 691 (1991), and under § 5 of the Voting Rights Act of 1965, Title 42 U.S.C. § 1973c, whether the State of Mississippi properly submitted the statutory repealer of § 37-7-611, Miss. Code Ann. (1971), to the United States Attorney General for preclearance. On an earlier day, this three-judge court which was convened under the aegis of § 5 of the Voting Rights Act of 1965, Title 42 U.S.C. § 1973c, and Title 28 U.S.C. § 2284 held that the repealer had been precleared since Mississippi had submitted to the United States Attorney General its comprehensive Uniform School Law, S.B. No. 2117, ch. 492, of which the repealer of § 37-7-611 was a part, and since thereafter the United States Attorney General had failed to register any objection within the requisite time period. After our holding was appealed to the United States Supreme Court, that august Court directed us to take a fresh look at the controversy *sub judice* under the juridical illumination cast by *Clark v. Roemer* which was decided after we had rendered our earlier holding. Having taken that fresh look, a majority of this panel now holds that when Mississippi submitted its comprehensive Uniform School Law, of which the repealer of § 37-7-611 was a part, Mississippi failed to abide by the *Clark v. Roemer* standard and identify with specificity the anticipated voting changes to be wrought by the enactment of the repealer to § 37-7-611. Accordingly, we find the repealer, § 37-7-611 to be ineffective and unenforceable

unless and until the United States Attorney General pre-clears the repealer, or withdraws the objection, or unless and until the State of Mississippi obtains a declaratory judgment from the United States District Court for the District of Columbia that the repealer does not have the purpose and will not have the effect of denying or abridging the plaintiffs' right to vote.

BACKGROUND

The plaintiffs, Johnny Dupree, et al., black residents and registered voters of Hattiesburg, Mississippi, and members of the Board of Trustees of the Hattiesburg School District brought this action pursuant to § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, contending that legislative action taken by the State of Mississippi, a covered jurisdiction under the Voting Rights Act, changed, modified or eliminated certain voting standards, practices and procedures in effect in Mississippi as of November 1, 1964. The plaintiffs' complaint, filed February 23, 1990, focused upon three then-recently enacted amendments to state law regulating municipal territorial annexations. The three targeted statutes at the bull's eye of plaintiffs' complaint were the following:

> (1) The 1977 Amendment to Miss. Code Ann. § 21-1-59 which provides that the annexation of a municipality across a county line will not affect the school district in the annexed area unless such school district consents for the annexed territory to be included in the municipal school district of the annexing municipality;

(2) The 1978 revision of the 1977 Amendment to Miss. Code. Ann. § 21-1-59 which covers situations where a municipality annexes farther into a county other than its own and provides for referenda in specific situations; and

(3) The 1986 repealer of Miss. Code. Ann. § 37-7-611. As part of the Mississippi Uniform School Law of 1986, this repealer provides that once annexed by a municipality, the annexed area will no longer be automatically merged with the municipal school district of the annexing municipality.

Plaintiffs correctly point out that these legislative actions promised to determine the boundaries of municipal and county school districts and the composition of the electorate for those districts.

Then, as to how the repealer of § 37-7-611 might specifically affect plaintiffs, plaintiffs showed that following its enactment, their City of Hattiesburg, situated in Forrest County, annexed other portions of Forrest County and portions of adjoining Lamar County. Plaintiffs predict that should the repealer go into effect the composition of the municipal electorate in the City of Hattiesburg, Mississippi, will be enlarged and changed by the inclusion of the annexed residents. But, while the annexed residents will be entitled to vote for Hattiesburg City Aldermen who appoint the members of the Hattiesburg Municipal School Board of Trustees, plaintiffs note that under the new statutes these annexed residents will not be merged automatically with the Hattiesburg School District as they would have been under the old law. Instead, as correctly observed by plaintiffs, under the

repealer, these residents cannot be merged with the Hattiesburg Municipal School District unless the annexed residents give their consent. Plaintiffs then opine that the Lamar County residents will bring into the City of Hattiesburg a largely white electorate which will significantly impact upon voting for City Aldermen, and indirectly, the appointment of Hattiesburg Municipal School Board members, even though the Lamar County residents may decide not to become a part of the Hattiesburg Municipal School District. Thus, aggrieved over this anomaly and convinced that these enactments fall within the embrace of § 5 since the enactments promise to impact upon voting, plaintiffs asked this court to enjoin § 37-7-611, as well as the 1977 and 1978 amendments to § 21-1-59 because they had not been precleared. *See NAACP v. Hampton County Election Commission*, 470 U.S. 166, 175, 105 S.Ct. 1128, 1133, 84 L.Ed.2d 124 (1985), n. 19.[1] *See also* 28 C.F.R. § 51.13(d) & (e), [[a]ny change in the boundaries of voting precincts . . . , and [a]ny change in the constituency of an official or the boundaries of a voting unit . . . requires preclearance].

The defendants here are the State of Mississippi and its Attorney General. The two affected school districts (Lamar and Forrest Counties) and their trustees later intervened. In response to the plaintiffs' complaint, the defendants asserted that the Mississippi legislative

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[1] The note states that when Congress extended the Voting rights Act in 1982 it did so out of concern for the prevalence of changes in state voting procedures which had been enacted and never submitted for preclearance.

actions in issue already had been properly and unambiguously submitted to the United States Attorney General. Further, said defendants, since the Attorney General had not interposed an objection, the legislative actions in question had been precleared in accordance with § 5 of the Voting Rights Act.

In April of 1991, this panel held that the repealer of § 37-7-611, as well as the 1977 and 1978 amendments to Miss. Code Ann. § 21-1-59 constituted changes in voting practices and procedures sufficient to require preclearance under § 5 of the Act. The panel also found that the 1977 and 1978 amendments to § 21-1-59 were changes which had not been submitted for preclearance. Hence, the panel declared them to be unenforceable. *Dupree v. Mabus*, 776 F.Supp 290 (S.D. Miss. 1991) (*Dupree I*).

However, the panel found that the repealer of Miss. Code Ann. § 37-7-611 had been precleared by the United States Attorney General on September 23, 1986, after the State of Mississippi had submitted "in its entirety" its Uniform School Law Senate Bill 2117, ch. 492, of which the repealer of § 37-7-611 was a part, to the United States Attorney General for preclearance. Because Federal Regulations require that the United States Attorney General request additional information or offer objections to a submission for preclearance within 60 days, 28 C.F.R. § 51.35 (1986), now 28 C.F.R. 51.9 (1989),[2] and because no

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[2] Section 51.9 states:

(a) The Attorney General shall have 60 days in which to interpose an objection to a submitted change affecting voting.

(b) Except as specified in §§ 51.37, 51.39, and 51.42 the 60-day period shall commence upon receipt by the Department of Justice of a submission.

specific objection had been made to the repealer of § 37-7-611 by the United States Attorney General when the Bill was submitted "in its entirety" on July 23, 1986, this court held that the United States Attorney General had in effect precleared the repealer of § 37-7-611.

The plaintiffs appealed the panel's finding with regard to the repealer of § 37-7-611 to the United States Supreme Court. Two months after this panel's decision, the United States Supreme Court decided the case of *Clark v. Roemer*, 500 U.S. ___, 111 S.Ct. 2096, 114 L.Ed.2d 691 (1991), holding that a State must "identify with specificity each change that it wishes the United States Attorney General to consider" in a § 5 submission, and that "any ambiguity in the scope of a preclearance request must be resolved against the submitting authority." *Id.* 111 S.Ct. at 2103-04. Thereafter, this case was remanded to this panel for further consideration in light of *Clark v. Roemer*. *See Dupree v. Moore*, ___ U.S. ___, 112 S.Ct. 1462, 117 L.Ed.2d 609 (1992). This court then directed the defendants and intervenors to resubmit their motion and accompanying briefs for summary judgment under Rule 56(b),[3] Federal Rules of Civil Procedure.

(c) The 60-day period shall mean 60 calendar days, with the day of receipt of the submission not counted. If the final day of the period should fall on a Saturday, Sunday, any day designated as a holiday by the President or Congress of the United States or any other day that is not a day of regular business for the Department of Justice, the Attorney General shall have until the close of the next full business day in which to interpose an objection. The date of the Attorney General's response shall be the date on which it is mailed to the submitting authority.

[3] Rule 56(b) of the Federal Rules of Civil Procedure provides:

So, the narrow issue for this panel to reconsider on remand is whether the State of Mississippi identified the repealer of § 37-7-611 unambiguously and with the specificity required to constitute a proper submission of the matter to the United States Attorney General for preclearance. As earlier stated, upon reconsideration, and in light of *Clark v. Roemer*, we conclude that the State of Mississippi did not.

PERTINENT FACTS[4]

Mississippi cities are permitted by Miss. Code Ann. §§ 21-1-29, *et seq.*, (1972)[5] to annex territory outside their

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(b) For Defending Party. A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

[4] Defendants-intervenors, Lamar County Board of Education and Trustees and Forrest County School District and Members of the Board of Trustees, argue that summary judgment is not appropriate because there are disputed issues of fact here which require a hearing. *See E.E.O.C. v. Boeing Services International*, 968 F.2d 549, 553 (5th Cir. 1992) (where the facts are not in dispute, the court focuses on whether a movant is entitled to judgment as a matter of law). This court is persuaded otherwise and is convinced that the undisputed facts set out herein are all that are necessary to resolve the issue before the court.

[5] Miss. Code. Ann. § 21-1-29 provides in part:

When any such ordinance (annexing territory) shall be passed by the municipal authorities, such municipal authorities shall file a petition in the chancery court of the county in which such municipality is located; however, when a municipality wishes to annex or extend its boundaries across and into an

boundaries by filing a petition in the Chancery Court where the territory is located. Prior to 1986, the status of city school districts, in the event of such municipal expansion, was governed by Miss. Code Ann. § 37-7-611 (1972).[6] When a city annexed territory, § 37-7-611 provided that the municipal school district automatically expanded to become coextensive with the city limits.

In 1986, the Mississippi Legislature enacted the Uniform School Law, Senate Bill 2117, chapter 492, which revised the state education code. Section 47 of this Bill specifically repealed § 37-7-611 and 22 other provisions of state law. In addition, Section 52 of the Bill amended Miss. Code Ann. § 37-7-103 (1972)[7] to provide that, when

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> adjoining county such municipal authorities shall file a petition in the chancery court of the county in which the territory is located. . . .

[6] Miss. Code Ann. § 37-7-611 (1972) provided in pertinent part:

> Where the corporate limits of any municipality which constitutes a municipal school district, either with or without added territory, are extended so as to include the whole or any part of an existing adjacent school district in the county school system or municipal separate district, then such adjacent school district, or such part thereof as is included within the corporate limits of the municipality by reason of the extension thereof, shall thereby automatically be merged with and become part of such municipal school district. . . .

[7] Miss. Code Ann. § 37-7-103 as amended provides:

> From and after July 1, 1987, the school board of any school district shall have full jurisdiction, power and authority, at any regular meeting thereof or at any special meeting called for that purpose, to abolish such existing district, or to reorganize, change or alter

a city annexed neighboring territory, the municipal school district would expand into any already existing school district only with the consent of the school board governing the annexed territory. Together, the repeal of § 37-7-611 and the amendment of § 37-7-103 wrought the following change: when a city now annexed neighboring territory, the municipal school district would expand into the annexed territory only with the consent of the school board governing that territory. Of course, the school board of a municipal school district is generally chosen by the city's elected governing body. Miss. Code Ann. § 37-7-203 (1990).[8]

On July 22, 1986, the State of Mississippi sent the Uniform School Law to the United States Attorney General for preclearance. The cover letter submitted with the School law stated that the School Law (S.B. 2117) was being submitted "in its entirety." The letter stated that,

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the boundaries of any such district. In addition thereto, with the consent of the school board of the school district involved, the school board may add to such school district any part of the school district adjoining same, and with the consent of the school board of the school district involved, may detach territory from such school district and annex same to an adjoining district.

[8] Miss. Code Ann. § 37-7-203(1) provides in pertinent part:
Except as otherwise provided herein, the trustees of such a municipal separate school district shall be elected by a majority of the governing authorities of the municipality at the first meeting of the governing authorities held in the month of February of each year, and the term of office of the member so elected shall commence on the first Saturday of March following.

"[f]or the sake of brevity, the submission will only set forth the particular sections which deal primarily with voting rights even though the complete act is submitted for review."

In a portion of this submission letter which was labeled "28 C.F.R. § 51.25(b),"[9] the State described 13 of the 205 sections of the Bill. Section 47 of the Bill, which repealed § 37-7-611, was not specifically described in the State's submission letter. Therefore, the submission did not specifically state that pre-existing Mississippi law provided for automatic expansion of municipal school districts without requiring the consent of the school board governing the annexed territory.

Section 52 of the Bill was among the 13 sections specifically described in the State's submission. As previously stated, Section 52 amended Miss. Code Ann § 37-7-103 (1972) to provide that, when a city annexed neighboring territory, the municipal school district would expand into any already existing school district only with the consent of the school board governing the annexed territory. The State's cover letter explained that under pre-existing law a county board of education could add territory to a municipal separate school district with the

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[9] Section 51.25(b) (1986) states:

(b) If the change affecting voting is not readily apparent on the face of the document provided under paragraph (a) or is not embodied in a document, a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and proposed situation with respect to voting.

consent of the school board of the district involved. However, the State's explanation said nothing about the previous method of automatic expansion of a municipal school district under § 37-7-611.

In addition to the letter, the State also included with its submission a certified copy of the bill and a looseleaf notebook entitled "Senate Bill Number 2117 – comparison of Current Law and New Law." The 467-page notebook contained the text of each provision of the Uniform School Law, together with photocopied pages containing provisions of prior state law, if any, that were amended by that provision. The text of Section 47 appeared in the enclosed bill and in the notebook, but the texts of the 23 provisions of law repealed by section 47 were not included in the notebook. The text of Section 47 simply stated that 23 cited provisions of state law – including § 37-7-611 – that "provide for the creation and operation of municipal separate school districts" are repealed.

On August 29, 1986, the United States Attorney General sent a letter to the Attorney General for the State of Mississippi, Edwin Lloyd Pittman, stating that he had no objection to Senate Bill 2117 as submitted. The United States Attorney General reserved the right to reexamine the matter within the remainder of the 60 day review period. The United States Attorney General also wrote:

> "The Attorney General does not interpose any objection to the voting changes occasioned by Senate Bill No. 2117 (1986), as identified in your July 22, 1986, letter. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin

the enforcement of such a change. In addition, as authorized by Section 5, the Attorney General reserves the right to reexamine this submission if additional information that would otherwise require an objection comes to his attention during the remainder of the sixty-day review period. See also 28 C.F.R. 51.42 and 51.48.

We note that several of the provisions of the Senate Bill No. 2117 (1986) authorize officials of political subdivisions of the State to make changes affecting voting which are viewed as enabling legislation. Therefore, local officials are not relieved of their responsibility to seek preclearance, pursuant to the requirements of Section 5, of any changes affecting voting (e.g., changing voting precinct lines, polling places, special election dates and procedures, boundary changes, etc.) which are adopted as a result of Senate Bill No. 2117. 28 C.F.R. 51.14."

Based on this portion of United States Attorney General's letter, the State of Mississippi says that it was confused about the preclearance of Senate Bill 2117. The State's cover memorandum to the United States Attorney General discussed only 13 sections of the bill, those sections the State of Mississippi determined were most relevant to voting rights. The repealer of § 37-7-611 was not one of the 13 sections set forth. Because of the wording of the August 29, 1986, letter, the State of Mississippi says it did not understand whether only those 13 sections were being approved, or whether the United States Attorney General was considering all the rest of 2117.

So, on December 30, 1987, the State of Mississippi resubmitted the repealer of Miss. Code Ann. § 37-7-611 for affirmative preclearance. This resubmission included

Section 47 of the Uniform School Act and explained that it was the automatic expansion of municipal school districts which had been repealed.

On February 29, 1988, the United States Attorney General requested extensive additional information regarding the repealer of § 37-7-611. This request came at the time of statewide election campaigning and was not immediately addressed by the State. After the election, the State of Mississippi submitted the requested information on January 27, 1989.

After reviewing the information submitted by the State of Mississippi, the United States Attorney General objected to the repealer of § 37-7-611 on March 31, 1989. The Attorney General concluded that repealing the automatic annexation provision of § 37-7-611 would "create a class of city voters who will not reside in the city school system yet may vote for the city governing body- . . . which under Mississippi law appoints the city school board." The United States Attorney General noted that the State had provided "no explanation for the establishment of such political system which appears not only to have the potential to impact negatively on the influence of minority city school district residents but also to treat black voters differently than white voters."

The State of Mississippi elected not to pursue at that time a declaratory judgment before the United States District Court for the District of Columbia, opting instead on January 12, 1990, to make a formal request to the United States Attorney General that he reconsider and withdraw his objection. The State argued that Section 47 had been sufficiently described in its initial submission as

providing for the creation and operation of municipal separate school districts. The State also argued that the School Law had been submitted it its entirety. Hence, reasoned the State, the United States Attorney General had no authority to grant limited preclearance of a law submitted in its entirety.

The State's arguments did not convince the United States Attorney General and by letter of May 25, 1990, he declined to withdraw his March, 1989, objection. In his letter, the United States Attorney General specifically responded to the State's contention that the repealer of § 37-7-611 necessarily had been precleared in 1986, stating:

> Section 5, as interpreted by the courts and our guidelines, plainly fixed the responsibility for identifying voting changes on the state, not the United States Attorney General, yet the state appears to be arguing . . . that the Attorney General should have uncovered voting changes of which the state itself seemingly was unaware at the time the prior submissions were made.

So, during the period of July 22, 1986, until May 25, 1990, although the State of Mississippi and the United States Attorney General had addressed preclearance of Mississippi's Uniform School Law, the parties had reached no common agreement with respect to the repealer of § 37-7-611. The Attorney General concluded that the statute had not been precleared, while the State said that it had. This lawsuit was born in February 1990, after the City of Hattiesburg had annexed neighboring territory in Forrest and Lamar Counties in 1989.

ANALYSIS

The juridical polestar which illuminates the key points of law here and leads us decisively to a solution is the case of *Clark v. Roemer*, 500 U.S. ___, 111 S.Ct. 2096, 114 L.Ed.2d 691 (1991), the decision upon which the remand of this case from the United States Supreme Court is based. Decided pursuant to § 5 of the Voting Rights Act of 1965, *Clark* fleshed out the skeletal question of what constitutes requisite notice by a state in a submission to the United States Attorney General under § 5. The specific interrogatory before the *Clark* Court was whether in preclearing newer portions of legislation the Attorney General also had approved undiscussed, unprecleared, older portions of the legislation where the newer and older portions interlocked to comprise the enactment. Emphasizing the obligation of States to provide requisite notice to the Attorney General of all prior unprecleared voting changes, the Court answered the question in the negative, first commenting that "*McCain [McCain v. Lybrand*, 465 U.S. 236, 104 S.Ct. 1037, 79 L.Ed.2d 271 (1984)] establishes a presumption that the Attorney General will review only the current changes in election practices effected by the submitted legislation, not prior unprecleared changes reenacted in the amended legislation." *Id.* 111 S.Ct. at 2104. Then, added the Court:

> In light of its legal errors, the District Court's finding that the Attorney General "expressly approved" the prior unprecleared changes cannot stand. Neither the initial submission nor the Attorney General's ruling upon it can be deemed to include the earlier unprecleared seats. Louisiana's submissions of

> contemporary legislation to the Attorney General failed as a matter of law to put him on notice that the prior unsubmitted changes were included. None of the submissions informed the Attorney General that prior voting changes were uncleared and were being transmitted along with the new changes. In most instances, Louisiana submitted only the legislation containing the new voting change. The record contains five submission letters, but these communications do not give requisite notice. Two were mere cover letters that added nothing to the submitted legislation. The other three letters note changes in the number of judges in a District, but as we have explained, this alone does not constitute a submission of the prior uncleared changes.

Id. 111 S.Ct. at 2104-05.

Hence, the *Clark* Court held that a State must "identify with specificity each change that it wishes the Attorney General to consider" in a § 5 submission. *Id.* 111 S.Ct. at 2104. Further, stated the Court, "any ambiguity in the scope of a preclearance request must be resolved against the submitting authority." *Id.* 111 S.Ct. at 2103. Explaining the rationale for this approach, the Court pointed to the "redoubtable obligations" of the Attorney General generated by the sheer volume of electoral changes – some 17,000 – submitted each year to the Justice Department which is tasked with undertaking independent investigations on limited resources. *Id.* 111 S.Ct. at 2104. The Court also voiced its apprehensions that a contrary approach "would diminish covered jurisdictions' responsibilities for self-monitoring under § 5 and would create incentives

for them to forego the submission process altogether." *Id.* 111 S.Ct. at 2104.

Upon measuring the facts *sub judice* by the bedrock principles enunciated by *Clark*, we conclude that the repeal of § 37-7-611 by the Uniform School Law was not precleared when the Attorney General precleared the voting changes as identified in the State's 1986 letter. In its 1986 submission, Mississippi affirmatively identified and discussed only 13 provisions of the Uniform School Law. Only those provisions, identified with specificity, then were properly submitted for preclearance. Thus, the Attorney General's letter of August 29, 1986, wherein he stated that he did "not interpose any objection to the voting changes occasioned by Senate Bill No. 2117 (1986) as identified in your [the State of Mississippi's] July 22, 1986, letter," precleared only the specifically identified changes noted in the 13 provisions.

Further, the State's submission letter did not mention Section 47 or § 37-7-611 at all. Hence, the State's submission failed to mention that pre-existing Mississippi law provided for automatic expansion of municipal school districts without requiring the consent of the school board governing the affected, annexed territory. Although the State's submission letter did discuss Section 52, in that portion of the submission letter the State did not discuss the repealed matter of automatic expansion. In discussing Section 52, the State merely explained the consent factor relative to alterations of school district boundaries. So, even if Section 52 in effect amounted to a repeal of § 37-7-611 by operation of state law, that fact

was not submitted to the Attorney General in 1986 nor reviewed by him as such.[10]

Nor did the State discuss, mention, or allude to the automatic expansion provision of § 37-7-611 in the 467-page looseleaf notebook entitled "Senate Bill Number 2117 – Comparison of Current Law and New Law" it submitted with its cover letter. While the text of Section 47 appeared in the notebook, the texts of the 23 provisions repealed by Section 47 were not included. The accompanying explanation provided in the text – that the repealed sections "provide for the creation and operation of municipal school districts" – neither refers to any voting change nor addresses at all the repeal of the automatic expansion provision.

In the past, Mississippi admitted that after receiving the United States Attorney General's letter of August 29, 1986, wherein the Attorney General discussed only 13 sections of the Bill, Mississippi was uncertain whether the United States Attorney General had considered the repealer of § 37-7-611. So, to resolve this ambiguous circumstance, the State resubmitted the repealer of § 37-7-611, since it was not one of the 13 sections set forth in the Attorney General's letter. Apparently, the State of Mississippi now asks this court to forget these facts since "any ambiguity in the scope of a preclearance request

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[10] Hence, this court does not find persuasive the holding in *Greenville Public School District v. Western Line Consolidated School District*, 575 So.2d 956 (Miss. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1512, 117 L.Ed.2d 649 (1992), which held that the Attorney General had in effect precleared the repeal of § 37-7-611 when he precleared Section 52.

must be resolved against the submitting authority." *Clark v. Roemer,* 111 S.Ct. at 2103.

In sum, Mississippi's 1986 submission is precisely that circumstance condemned by *Clark v. Roemer.* Should this court permit Mississippi to submit a haystack of documents and obligate the Attorney General to painstakingly search for any voting change needle, as Mississippi as [sic] done here, this court would be ignoring *Clark's* clear pronouncement that a State must "identify with specificity each change that it wishes the Attorney General to consider" in a § 5 submission. *Id.* 111 S.Ct. at 2104. Similarly, Mississippi's stance that § 37-7-611 stands precleared because the Uniform School Law was submitted "in its entirety," if accepted by this court, would but "add to the Attorney General's already redoubtable obligations the additional duty to research each submission to ensure that all earlier unsubmitted changes had been brought to light," *id.*, and undoubtedly "diminish covered jurisdictions' responsibilities for self-monitoring under § 5 and would create incentives for them to forego the submission process altogether." *Id.*

CONCLUSION

IT IS, THEREFORE, ORDERED AND ADJUDGED that the motion of the defendants and intervenors for summary judgment that the repealer of Miss. Code Ann. § 37-7-611 was precleared on September 23, 1986, is not well taken and the same is hereby denied. Miss. Code Ann. § 37-7-611 is hereby found to be ineffective and unenforceable unless and until the State of Mississippi gets either the United States Attorney General to preclear

the repealer, or to withdraw his objection, or the State of Mississippi obtains a declaratory judgment from the District of Columbia District Court stating that the repealer has no discriminatory effect upon voting rights in Mississippi.

SO ORDERED AND ADJUDGED, this the 25th day of August, 1993.

/s/ Tom S. Lee
TOM S. LEE
UNITED STATES
DISTRICT JUDGE

/s/ Henry T. Wingate
HENRY T. WINGATE
UNITED STATES
DISTRICT JUDGE

Civil Action No. H90-0043(W)
Memorandum Opinion and Order

Dupree v. Moore, et al.; No. H90-0043(W) BARKSDALE, Circuit Judge, dissenting:

In April 1991, this court held, *inter alia,* that, as part of the Uniform School Law of 1986, the repealer of Miss. Code Ann. § 37-7-611 (the repealer) was properly submitted by Mississippi for preclearance, as required by § 5 of the Voting Rights Act of 1965 (Act), 42 U.S.C. § 1973c. We therefore granted summary judgment that the repealer is enforceable. *Dupree v. Mabus,* 776 F.Supp. 290 (*Dupree I*). Only that portion of the judgment was appealed; and the

Supreme Court remanded this case for further consideration in light of *Clark v. Roemer*, 500 U.S. ___, 111 S.Ct. 2096 (1991). The sole issue before us is whether the State identified the repealer with specificity, thus properly submitting it for preclearance. Relying on *Clark*, the majority concludes that the State did not sufficiently do so. I disagree, and thus respectfully dissent.

I.

The plaintiffs, residents and registered voters of Hattiesburg, Mississippi, and members of the Board of Trustees of its school district, filed this action in February 1990 against the State of Mississippi and its Governor[1] and Attorney General, alleging that several statutes had not received the requisite § 5 preclearance and are therefore unenforceable. Hattiesburg is located in Lamar and Forrest Counties; their Boards of Education and Trustees intervened as defendants.

The Act provides that certain jurisdictions may not implement any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964" without first obtaining approval from the United States District Court for the District of Columbia or, alternatively, from the United States Attorney General (USAG), that the proposed change does not, or will not, have a discriminatory purpose or effect. 42 U.S.C. § 1973c.

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[1] The Governor was dismissed from the action. 776 F.Supp. at 296-97.

The plaintiffs challenged three laws that affect the composition of municipal and county school districts: (1) the 1977 amendment to Miss. Code Ann. § 21-1-59, Ch. 379, 1977 Miss. Laws 543; (2) the 1978 revision of that amendment, Ch. 312, 1978 Miss. Laws 418; and (3) the repealer of § 37-7-611 – § 47 of the 1986 Uniform School Law, Ch. 492, 1986 Miss. Laws 687. The amendments and the repealer have the same effect – municipal school districts no longer automatically expand to the same extent as the municipal annexations, resulting in a class of city voters who do not reside in the city school system but may vote for the city governing body; that body in turn elects the municipal school board. 776 F.Supp. at 299-300, 304 n.8.

This court held in *Dupree I* that the creation of this class constitutes at least an indirect change in voting, covered by § 5 of the Act. 776 F.Supp. at 299-300. Upon so holding, it examined whether the challenged laws had been precleared. *See id.*, at 293-96, 300-04. It held that the 1977 and 1978 amendments to § 21-1-59 had not been precleared and, accordingly, are not enforceable. Conversely, it concluded that the USAG precleared the Uniform School Law of 1986 in its entirety, including the repealer, and therefore held that the repealer is enforceable. *Id.*, at 303-04.

II.

Plaintiffs contend, and the majority agrees, that *Clark* compels the conclusion that the State did not adequately identify the repealer. As stated, I respectfully disagree. *Clark* and its precursor, *McCain v. Lybrand*, 465 U.S. 236

(1984), both involve a State's failure to submit a specifically identifiable preclearance request and are therefore factually distinguishable from this case.

Clark involved a challenge under § 5 to the validity of Louisiana's multimember, at-large electoral scheme for certain judicial positions. In response to a July 1987 amended complaint concerning Louisiana's failure to submit several statutory and constitutional voting changes for preclearance, it submitted all of its unprecleared voting changes. The USAG granted preclearance for some, but objected to others. Louisiana asked the USAG to reconsider his objections and continued with plans to hold elections in the fall of 1990.

In October 1990, the three-judge court grouped into one category those districts where Louisiana had obtained preclearance for later-created judgeships, but not the earlier created judgeships in issue.[2] The district court, despite the USAG's objections, held that the USAG's preclearance of later, related voting changes

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[2] In a second category, the district court grouped unprecleared judgeships subject to valid objections by the USAG. Despite its conclusion that these unprecleared judgeships violated § 5, the court refused to enjoin the elections. The Supreme Court held that the court erred by not enjoining elections held for judgeships to which the USAG had valid § 5 objections. *Clark*, 111 S.Ct. at 2101. The Court's analysis concerning this second category is not relevant to the issue before this court.

resulted in preclearance of the earlier, unprecleared judgeships.[3]

The Supreme Court disagreed. It stated that the district court's ruling was inconsistent with the presumption established in *McCain*, that the USAG reviews "current changes in election practices effected by the submitted legislation, not prior unprecleared changes reenacted in the amended legislation". *Clark*, 111 S.Ct. at 2104. The Court emphasized that in order to minimize the administrative burden on the USAG, the State "must identify with specificity each change that it wishes the Attorney General to consider"; it also repeated that "any ambiguity in the scope of the preclearance request must be resolved against the submitting authority". *Id.* Accordingly, the Court did not alter the standard for § 5 preclearance requirements; rather, it reiterated the principles stated in *McCain*, and emphasized the need to maintain "the efficacy of administrative preclearance under § 5". *Clark*, 111 S.Ct. 2102.

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[3] The following is an example of the district court's reasoning:

> Louisiana submitted and obtained approval for Divisions E (created in 1966, precleared in 1986), G (created and precleared in 1976), H (created and precleared in 1978), and I (created and precleared in 1982). Division F was not submitted for approval when it was created in 1973; rather, it was submitted and objected to in 1978. . . . [However,] because the legislation creating Divisions G, H, and I added to the number of prior judgeships in Caddo Parish, including Division F, approval of the legislation constituted approval of Division F.

Clark, 111 S.Ct. at 2100.

In *McCain*, discussed at length in *Dupree I*, 776 F.Supp. at 302-03, the district court provided two alternatives to support its conclusion that the USAG precleared a 1966 Act. It reasoned that because the State submitted the 1966 Act in response to a request by the USAG for additional information, the 1966 Act was part of the preclearance submission. Alternatively, it reasoned that because a 1971 Act retained or incorporated the 1966 Act, lack of objection to the 1971 submission resulted in preclearance of the 1966 Act.

The Supreme Court reversed and set forth three general principles: first, it stated that the submission, not subsequent responses, defines the scope of the request; second, it reiterated that ambiguity is resolved against the submitting authority; and third, it clarified that the submission of a current change does not encompass prior unprecleared changes. *McCain*, 408 U.S. at 251, 257.

Despite the Supreme Court's rejection of the district court's reasoning in *McCain*, the district court in *Clark* applied similar reasoning:

> When the Attorney General approves the new act, he not only approves the amended portion but necessarily approves the older, reenacted part, which forms part of the new act. Thus, when an act provides for a certain number of judicial positions, approval of that act must include all of the judicial positions necessary to reach that number.

Clark v. Roemer, 751 F.Supp. 586, 593 (M.D. La. 1990) (footnote omitted).

The Supreme Court again rejected this reasoning: "The District Court's explanation for its holding replicates the precise factual and legal errors we identified in *McCain*. . . . A submission's description of the change from one number of judges to another in a particular judicial district does not, by itself, constitute a submission to the Attorney General of the prior voting changes incorporated in the newly amended statute". *Clark*, 111 S.Ct. at 2104.

Unlike *McCain*, Mississippi submitted the repealer as part of its initial submission; therefore, the repealer defined the scope of that part of the request. Moreover, Mississippi specifically identified the repealer as a *current* change; unlike *McCain* and *Clark*, it was not a prior, uncleared change presumably encompassed by the submission of a current change.[4]

Finally, the submission was neither ambiguous nor vague.[5] The title of the submitted law, the Uniform

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[4] By contrast, in *Dupree I*, this court held that Mississippi failed as a matter of law to put the USAG on notice that the 1977 amendment was submitted for preclearance. Using language similar to that later used by the Supreme Court in *Clark*, we concluded that defendants' contention that approval of the 1978 amendment cured the failure to submit the 1977 amendment for preclearance was specifically rejected by the Supreme Court in *McCain* and therefore without merit. 776 F.Supp. at 303.

[5] The United States asserts that the USAG's response letter of August 29, 1986, stating that he did "not interpose any objection to the voting changes occasioned by [the Uniform School Law] as identified in your July 22, 1986, letter", indicates that the USAG only precleared the 13 changes identified in the cover memorandum, not the repealer identified in the accompanying materials. In *Dupree I*, we fully considered and rejected this

School Law of 1986, indicates a massive reorganization of various laws. The cover memorandum submitted by the State explained the comprehensive nature of the submission and stated that the law was submitted "in its entirety". The memorandum specifically advised the USAG that "[f]or the sake of brevity, the submission will only set forth the particular sections which deal *primarily* with voting rights *even though the complete act is submitted for review*". (Emphasis added.) *Dupree I*, 776 F.Supp. 294-95.

Section 37-7-611, enacted in 1926, was repealed in 1986 by § 47 of the Uniform School Law. As stated, § 37-7-611 provided for a municipal school district to expand automatically into territory annexed by the city.[6]

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interpretation. 776 F.Supp. at 303. Accordingly, I disagree with the majority's reliance on the State's resubmission subsequent to receipt of the USAG's response letter. The USAG's letter specifically mentioned only those 13 changes discussed in the cover memorandum and thus understandably caused the State to question whether the USAG precleared the remainder of the Act. By contrast, the State's submission letter specifically advised that "the complete act is submitted for review".

[6] The section stated in part:

> Where the corporate limits of any municipality which constitutes a municipal separate school district, either with or without added territory, are extended so as to include the whole or any part of an existing adjacent school district in the county school system or municipal separate school district, then such adjacent school district, or such part thereof as is included within the corporate limits of the municipality by reason of the extension thereof, shall thereby automatically be merged with and become a part of such municipal separate school district.

Misc. Code Ann. § 37-7-611 (1972).

Although § 47 of the Uniform School Law, the repealer, was not discussed in the cover letter, which explained 13 sections of the Uniform School Law and their effect on voting, it was specifically identified in the booklet that accompanied the submission. The booklet compared each section of the Uniform School Law with prior law, together with providing an underlined version of the Uniform School Law, reflecting new language as well as deletions of prior language. *Id.* The booklet's introductory note explained that "[b]y comparing each section of [the Uniform School Law] and the current practice, the changes to current law are easily identified". As discussed, § 47 of the Uniform School Law provided for the repeal of 23 sections, including the above described § 37-7-611. The booklet stated that these 23 sections "which provide for the *creation and operation of municipal separate school districts,* are hereby repealed". *Dupree I,* 776 F.Supp. 295 (emphasis added).

In addition, § 52 of the Uniform School Law amended § 37-7-103 and provided a single procedure in place of the prior, several school districting procedures. It was specifically discussed in both the cover memorandum accompanying the submission (it was one of the 13 specifically identified sections) and in the booklet. *See Dupree I,* 776 F.Supp. at 295-96. In describing this new uniform procedure under amended § 37-7-103, the cover memorandum stated in part:

> . . . [T]he school board with the consent of the school board of the district involved may add to such school district any part of the school district adjoining same or may detach territory

> from such school district and annex the same to an adjoining district.

Dupree I, 776 F.Supp. at 295.

Accordingly, the submission specifically identified both the repealer and the replacement. And, as should have been clear to the USAG, through review of the identified sections, a new, single procedure was replacing, *inter alia*, the prior procedure for municipal separate school districts, one of which was their automatic expansion into annexed areas. Therefore, what more *should – not could* – have been done? Again, *McCain* and *Clark* must be considered.

In *Clark*, the Court stated that adherence to the district courts' rationale in *McCain* and *Clark* would "upset[ ] th[e] ordering of responsibilities under § 5". 111 S.Ct. at 2104. It stressed that it is the responsibility of covered jurisdictions to submit unprecleared changes for review; to conclude that preclearance of a current change includes unidentified prior unprecleared changes "would add to the Attorney General's already redoubtable obligations the additional duty to research each submission to ensure that all earlier unsubmitted changes had been brought to light". *Id.* The Court "reaffirm[ed] *McCain* in rejecting this vision of § 5", because "[s]uch a rule would diminish covered jurisdictions' responsibilities for self-monitoring under § 5 and would create incentives for them to forgo the submission process altogether." *Id.*[7]

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[7] *See* note 4, *supra*, concerning this court reaching this same result in *Dupree I*.

Here, however, the submission of the repealer meets the requisite level of specificity; it did not impose an administrative burden of the same quality and magnitude as that at issue in *Clark* – far from it. As discussed, Mississippi specifically identified the submitted change. The State did not impose upon the USAG the added responsibility of conducting independent research to locate an unprecleared prior or related change not identified in the submission. The booklet specifically identifying the repealer accompanied the cover memorandum. No doubt, the State *could* have been *more* helpful by including the text of the repealed statute; however, the regulations then in effect *did not require* covered jurisdictions to submit a copy of the prior law being amended or repealed. 28 C.F.R. § 51.25 (1986).[8] *See* 776 F.Supp. at 300. And, no doubt, it *could* have been even more helpful by describing how the § 37-7-611 automatic municipal school district expansion procedure repealed by § 47 of the Uniform School Law was one of the procedures replaced by the procedure established by § 52 of that law. *See* 776 F.Supp. at 302-03.[9] The test, however, is not whether the State was as helpful as, with 20-20 hindsight, it could have been, but whether it put the USAG on notice that the repealer was submitted for preclearance. I would

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[8] The current regulation requires "[a] copy of any ordinance, enactment, order, or regulation embodying the voting practice that is proposed to be repealed, amended, or otherwise changed". 28 C.F.R. § 51.27 (1992).

[9] The plaintiffs complain that the State did not advise the USAG that § 52 was the *sole* method for such districting. But, as discussed in *Dupree I*, 776 F.Supp. at 303, the entire, *uniform* law was submitted.

hold, as this court did in *Dupree I*, that the State satisfied that test.

Accordingly, I respectfully dissent.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

JOHNNY DUPREE, ET AL.	PLAINTIFFS
V.	
MIKE MOORE, ATTORNEY GENERAL OF MISSISSIPPI, IN HIS OFFICIAL CAPACITY, AND THE STATE OF MISSISSIPPI	DEFENDANTS
and	
THE LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, IN THEIR OFFICIAL CAPACITIES	DEFENDANTS/ INTERVENORS
and	
FORREST COUNTY SCHOOL DISTRICT AND THE MEMBERS OF THE BOARD OF TRUSTEES IN THEIR OFFICIAL CAPACITIES	DEFENDANTS/ INTERVENORS

CIVIL ACTION NO. H90-0043(W)

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before **BARKSDALE**, Circuit Judge, and **LEE** and **WINGATE**, District Judges.

ORDER

(Filed Sep. 27, 1993)

Pursuant to Rule 60(a) of the Federal Rules of Civil Procedure, the Court issues this order to correct the following clerical mistakes arising from oversight or omission in the Court's Memorandum Opinion and Order filed on August 27, 1993.

(1) The last sentence on page 7, which continues on page 8, shall be deleted, along with footnote 3, and the following sentence inserted in its place: This court then directed the parties to submit briefs within the scope of the remand by the United States Supreme Court.

(2) On page 21, after the first sentence under the paragraph titled "Conclusion", the following sentence is inserted: The plaintiffs' motion for summary judgment is granted.

(3) On page 21, in the first full sentence beginning with "Similarly . . . ," insert "the repealer of" before § 37-7-611, so that the sentence reads: Similarly, Mississippi's stance that the repealer of § 37-7-611 stands prepared because the Uniform School Law was submitted "in its entirety," if accepted by this court, would but "add to the Attorney General's already redoubtable obligations the additional duty to research each submission to ensure that all earlier unsubmitted changes had been brought to light," *id.*, and undoubtedly "diminish covered jurisdictions' responsibilities for self-monitoring under § 5 and would create incentives for them to forego the submission process altogether." *Id.*

(4) In the second sentence on page 21, under the paragraph titled "Conclusion", the phrase "The repealer of" should be inserted at the beginning of that sentence. As corrected, the sentence shall read: The repealer of Miss. Code Ann. § 37-7-611 is hereby found to be ineffective and unenforceable unless and until the State of Mississippi gets either the United States Attorney General to preclear the repealer, or to withdraw his objection, or the State of Mississippi obtains a declaratory judgment from the District of Columbia District Court stating that the repealer has no discriminatory effect upon voting rights in Mississippi.

SO ORDERED, this the 24th day of September, 1993.

/s/ Tom S. Lee
TOM S. LEE
UNITED STATES DISTRICT JUDGE

/s/ Henry T. Wingate
HENRY T. WINGATE
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

JOHNNY DUPREE, *et al.*	PLAINTIFFS
v.	CIVIL ACTION NO. H90-0043(W)
MIKE MOORE, Attorney General of Mississippi, in His Official Capacity, and THE STATE OF MISSISSIPPI	DEFENDANTS
and	
THE LAMAR COUNTY BOARD OF EDUCATION and TRUSTEES, *et al.*	DEFENDANTS/ INTERVENORS
and	
FORREST COUNTY SCHOOL DISTRICT, *et al.*	DEFENDANTS/ INTERVENORS

NOTICE OF APPEAL

(Filed May 12, 1994)

Defendants Mike Moore, in His Official Capacity as Attorney General of the State of Mississippi, and the State of Mississippi, together with Defendants/Intervenors the Lamar County Board of Education and the Trustees thereof in Their Official Capacities, and Defendants/Intervenors the Forrest County School District and the Members of the Board of Trustees thereof in Their Official Capacities, pursuant to 42 U.S.C. § 1973c, 28 U.S.C. § 1253, 28 U.S.C. § 2101 and 28 U.S.C. § 2106, hereby appeal to the Supreme Court of the United States from

the three-judge district court's Memorandum Opinion and Order entered on August 27, 1993 (an appeal from which was previously taken pursuant to the Notice of Interlocutory Appeal filed with the district court on September 24, 1993), and the Order entered by the three-judge district court on April 12, 1994, denying the joint motions of the Defendants and Defendants/Intervenors for a new trial, to alter or amend judgment, and for a remedy.

THIS, the 9th day of May, 1994.

Respectfully submitted,

MIKE MOORE, Attorney General
of Mississippi, and THE STATE
OF MISSISSIPPI, DEFENDANTS

OFFICE OF ATTORNEY
GENERAL
Post Office Box 220
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601-359-3680

By: /s/ Giles W. Bryant
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Assistant Attorney General

THE LAMAR COUNTY BOARD OF
EDUCATION and TRUSTEES, in
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By: /s/ Dennis L. Horn
DENNIS L. HORN, Bar #2645

FORREST COUNTY SCHOOL DISTRICT and the Members of the BOARD OF TRUSTEES Thereof in Their Official Capacities, DEFENDANTS/ INTERVENORS

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By: /s/ S. Mark Wann
S. MARK WANN, Bar No. 6936

CERTIFICATE OF SERVICE

I, S. Mark Wann, do hereby certify that I have this day mailed by United States mail, postage fully prepaid, a true and correct copy of the above and foregoing Notice of Appeal to the following counsel of record:

Perry Sansing, Esquire
Brunini, Grantham, Grower & Hewes
1400 Trustmark Bank Building
248 East Capitol Street
Post Office Box 119
Jackson, Mississippi 39205
COUNSEL FOR PLAINTIFFS

THIS the 9th day of May, 1994.

/s/ S. Mark Wann
S. MARK WANN

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

JOHNNY DUPREE, ET AL.	PLAINTIFFS
vs.	CIVIL ACTION NO. H90-0043(W)
MIKE MOORE, ET AL.	DEFENDANTS
and	
THE LAMAR COUNTY BOARD OF EDUCATION, ET AL.	DEFENDANTS/ INTERVENORS
and	
THE FORREST COUNTY SCHOOL DISTRICT, ET AL.	DEFENDANTS/ INTERVENORS

NOTICE OF INTERLOCUTORY APPEAL

(Filed Sep. 24, 1993)

Defendants Mike Moore, in his official capacity as Attorney General of the State of Mississippi, and the State of Mississippi, together with Defendants-Intervenors the Lamar County Board of Education, and the trustees thereof in their official capacities, and Defendants-Intervenors the Forrest County School District, and the members of the Board of Trustees thereof in their official capacities, pursuant to 28 U.S.C. §2101 and 42 U.S.C. §1973c, hereby appeal to the Supreme Court of the United States from the three-judge district court's Memorandum Opinion and Order entered on August 27, 1993.

This the 24th day of September, 1993.

Respectfully submitted,

MIKE MOORE, Attorney General of Mississippi, and THE STATE OF MISSISSIPPI, DEFENDANTS

Robert E. Sanders MSB #6446
Giles W. Bryant MSB #8419

Assistant Attorneys General
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By: /s/ Giles W. Bryant

THE LAMAR COUNTY BOARD OF EDUCATION and TRUSTEES, IN THEIR OFFICIAL CAPACITIES, DEFENDANTS/INTERVENORS

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By: /s/ Dennis L. Horn

FORREST COUNTY SCHOOL DISTRICT
and the Members of the BOARD OF TRUSTEES Thereof in Their Official Capacities, DEFENDANTS/INTERVENORS

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(601) 355-8855

By: /s/ S. Mark Wann

CERTIFICATE OF SERVICE

This is to certify that I, S. Mark Wann, have caused to be mailed this date, via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing Notice of Interlocutory Appeal to Honorable Perry Sansing, Post Office Drawer 119, Jackson, Mississippi 39205.

This, the 24th day of September, 1993.

/s/ S. Mark Wann
S. Mark Wann
MSB #6936

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

Civil Action No. H90-0043(W)

JOHNNY DUPREE, ET. AL,

Plaintiffs,

versus

RAY MABUS, Governor of Mississippi, ET. AL,

Defendants,

THE LAMAR COUNTY BOARD OF EDUCATION and TRUSTEES, in their official capacities and FORREST COUNTY SCHOOL DISTRICT and the Members of the BOARD OF TRUSTEES in their official capacities,

Defendants/Intervenors.

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
APR 02 1991
J. T. NOBLIN, CLERK
BY _____ DEPUTY

MEMORANDUM OPINION AND ORDER

Pursuant to 42 U.S.C. § 1973c and 28 U.S.C. § 2284, this action under § 5 of the Voting Rights Act of 1965 is before this three-judge Court on motions for summary judgment pursuant to Fed.R.Civ.P. 56 by (1) the plaintiffs, members of the Board of Trustees of the Hattiesburg Pub-

lic School District; (2) defendants, Ray Mabus and Mike Moore in their capacities as Governor and Attorney General of Mississippi, respectively, and the State of Mississippi; and (3) intervenor/defendant, the Forrest County School District and its Board of Trustees; and on the Rule 12(b) motion to dismiss by intervenor/defendant, the Lamar County Board of Education and its Trustees.[1]

I.

Beginning in 1966, the City of Hattiesburg (City) began expanding, through annexations, into Forrest and Lamar Counties; and the citizens in these annexed areas vote in City municipal elections. However, the City's municipal school district boundaries have not expanded with the annexations.

State laws enacted, and in one instance repealed, since 1977 affect the composition of both municipal and county school districts and allow the annexed areas' voters not residing in the City school district to vote for the City's governing authorities, who in turn select the City school board. Accordingly, the plaintiffs allege that these changes constitute voting changes covered by § 5 of the Voting Rights Act of 1965 (Act), 42 U.S.C. § 1973c.

The plaintiffs, residents and registered voters in the City and Forrest County and duly appointed members of the Board of Trustees of the City school district, filed this action in February 1990, seeking, *inter alia*, to enjoin the State of Mississippi and state officials from enforcing three

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[1] The state defendants moved to dismiss for failure to state a claim upon which relief may be granted, Rule 12(b)(6), or alternatively for summary judgment. Rule 12(b) provides that if a 12(b)(6) motion is made and "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Because we consider matters outside the pleadings, we treat the motions to dismiss as summary judgment motions.

state statutes: (1) the 1977 amendment to Miss. Code Ann. § 21-1-59, Ch. 379, 1977 Miss. Laws 543; (2) the 1978 revision of the 1977 amendment to § 21-1-59, Ch. 312, 1978 Miss. Laws 418; and (3) the 1986 repealer of Miss. Code Ann. § 37-7-611, Uniform School Law, Ch. 492, § 47, 1986 Miss. Laws 687. The plaintiffs contend that these laws have not been precleared pursuant to § 5 of the Act and are therefore unenforceable.[2]

The Lamar and Forrest County Boards of Education and the members of their Boards of Trustees intervened as defendants. The Lamar County Board filed a counterclaim, alleging that the relief sought by the plaintiffs would violate a desegregation order under which the Lamar County School District operates, by radically altering the racial balance of that district in violation of 42 U.S.C. § 1983 and the Fourteenth Amendment.

It is undisputed that § 52 of the Uniform School Law, § 37-7-103, was precleared. In effect, it is the successor to one of the three statutes in issue—§ 37-7-611. The Mississippi Supreme Court recently held in *Greenville Public School District, et al. v. Western Line Consolidated School District, et al.*, No. 07-CA-59534 (December 12, 1990), that the repeal of § 37-7-611 was precleared when the United States Attorney General (USAG) failed to interpose an objection to the entire 1986 Uniform School Law. That court also held that if not expressly precleared, § 37-7-611 was precleared implicitly by the express preclearance of § 37-7-103 of the Uniform School Law, because the two provisions are "clearly inconsistent." *Id.* at 14.

II.

The Act provides that certain jurisdictions may not implement any "voting qualification or prerequisite to voting,

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[2] Pursuant to its March 7, 1991, motion, the United States was granted leave to submit a brief as amicus curiae. The United States contends that § 5 applies and that the requisite preclearance has not been received.

or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964" without first obtaining approval from the United States District Court for the District of Columbia or, alternatively, from the USAG that the proposed change does not, or will not, have a discriminatory purpose or effect. 42 U.S.C. § 1973(c).

Due to the expense and burden of instituting an action for declaratory judgment in the D.C. District Court, most covered jurisdictions opt for the USAG approval alternative. The Act and regulations implemented under it provide that once a proposed change has been submitted to the USAG, he has 60 days within which to object. The USAG may request additional information; and if an objection is interposed by the USAG, the submitting party may request reconsideration. 28 C.F.R. §§ 51.37; 51.45. Such a request triggers another 60 day period for the USAG to decide whether to continue or withdraw his objection. *Id.* at § 51.48. If the USAG fails to object within the prescribed time, the jurisdiction is free to implement the new enactment. But, even if the legislation is precleared by the USAG, nothing in the statute prevents a subsequent judicial challenge to that legislation.

We turn first to a discussion of the Mississippi statutes in issue: §§ 21-1-59 and 37-7-611 (repealed).

A.

Prior to 1977, § 21-1-59 provided that "[n]o municipality shall be created or shall change its boundaries so as to include within the limits of such municipality any of the buildings or grounds of any state institution" unless consent was obtained from the governing body of the institution. In 1977, the section was amended to add the following:

> Provided further, that any change in the boundaries of a presently existing municipality *which*

> *crosses county lines* shall not affect the public school district located in the annexed area unless and until consent thereto shall have first been obtained in writing from the Board of Trustees of the school district proposed to be partially or wholly included in the change of municipal boundaries.

Ch. 379, 1977 Miss. Laws 543 (emphasis added). This amendment was applicable to certain of the City's annexations; it created an exception to the above referenced § 37-7-611, further discussed below, which provided that such expansion automatically included the municipal school district incorporating the annexed area.

As discussed below, the 1977 amendment was not submitted for preclearance to the USAG until March 23, 1990, because the state defendants believed that the amendment was not subject to § 5, being of the view that it had the effect of preserving the status quo and was thus not a voting "change."

In 1978, § 21-1-59 was amended again. Ch. 312, 1978 Miss. Laws 418. The amendment made the statute applicable to future annexations into a neighboring county by adding the following italicized language:

> Provided further that any changes in the boundaries of a presently existing municipality which *extends into or further extends into a county in which the municipality's principal office is located* shall not affect the public school district located in the annexed area, unless and until consent thereto shall have been first obtained. . . .

(Emphasis added.) A referendum provision was also added for the Jones County-Laurel area concerning the acquisition of county school territory by the Laurel public schools.

The statute, as amended in 1978, was submitted for preclearance in April 1978. The submission did not mention

the "extends into or further extends" language, referencing only the referendum. When the State responded to the USAG's request for additional information, again no mention was made of the "extends" language. In March 1981, the USAG interposed no objection.

The 1986 Uniform School Law did not change § 21-1-59. In May 1990, the USAG objected to the 1977 amendment submitted for preclearance, stating:

> [W]e note that the state makes several claims about the preclearance status of the instant changes which appear to seriously misconstrue the structure, purpose, and history of the preclearance requirement. . . . The state . . . contends that a 1978 amendment which clarified the scope of the instant 1977 change was precleared when the state in 1981 received preclearance for a separate portion of the 1978 statute.

The USAG rejected this claim.

B.

Prior to being repealed in 1986 by § 47 of the Uniform School Law, Ch. 492, 1986 Miss. Laws 687, the other statute in issue, § 37-7-611, enacted in 1926, stated in part:

> Where the corporate limits of any municipality which constitutes a municipal separate school district, either with or without added territory, are extended so as to include the whole or any part of an existing adjacent school district in the county school system or municipal separate school district, then such adjacent school district, or such part thereof as is included within the corporate limits of the municipality by reason of the extension thereof, shall thereby automatically be merged with and become a part of such municipal separate school district.

Miss. Code Ann. § 37-7-611 (1972). As discussed above, § 21-1-59, as amended in 1977 and 1978, provided an exception to § 37-7-611, concerning how municipal school districts were affected by certain municipal expansions.

In 1986, the Mississippi Attorney General (MAG) submitted Senate Bill 2117, the Uniform School Law of 1986, for preclearance. The cover memorandum for the submission stated that the law was submitted "in its entirety" and provided:

> The act accomplishes a reorganization and streamlining of laws which govern the operation, financing, and administration of the public schools in Mississippi. Senate Bill number 2117 is reform legislation supplemental to and a logical extension of the Education Reform Act of 1982. . . . *For the sake of brevity, the submission will only set forth the particular sections which deal primarily with voting rights even though the complete act is submitted for review.*

(Emphasis added.) The memorandum explained 13 sections of the Uniform School Law and their effect on voting.

The repealer of § 37-7-611 was not discussed in this cover letter. However, accompanying the submission was a booklet comparing each section of Senate Bill 2117 with prior law, together with an underlined version of Senate Bill 2117, reflecting the new language as well as deletions of prior language. The booklet's introductory note provided:

> This booklet sets forth on a section by section basis each section of the current law which has been amended followed by each individual section of Senate Bill Number 2117, Laws of Mississippi, 1986 Regular Session. Where the sections of Senate Bill Number 2117 are new law then only those particular sections will be denoted with no comparison of current law. This section by sec-

the "extends into or further extends" language, referencing only the referendum. When the State responded to the USAG's request for additional information, again no mention was made of the "extends" language. In March 1981, the USAG interposed no objection.

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B.

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> The act accomplishes a reorganization and streamlining of laws which govern the operation, financing, and administration of the public schools in Mississippi. Senate Bill number 2117 is reform legislation supplemental to and a logical extension of the Education Reform Act of 1982. . . . *For the sake of brevity, the submission will only set forth the particular sections which deal primarily with voting rights even though the complete act is submitted for review.*

(Emphasis added.) The memorandum explained 13 sections of the Uniform School Law and their effect on voting.

The repealer of § 37-7-611 was not discussed in this cover letter. However, accompanying the submission was a booklet comparing each section of Senate Bill 2117 with prior law, together with an underlined version of Senate Bill 2117, reflecting the new language as well as deletions of prior language. The booklet's introductory note provided:

> This booklet sets forth on a section by section basis each section of the current law which has been amended followed by each individual section of Senate Bill Number 2117, Laws of Mississippi, 1986 Regular Session. Where the sections of Senate Bill Number 2117 are new law then only those particular sections will be denoted with no comparison of current law. This section by sec-

> tion comparison provides explanatory materials adequate to disclose the difference between the prior and the proposed law. Each section of Senate Bill Number 2117 which is the version of the bill as sent to the governor is marked to show the changes made in the current law. Underlining indicates language added and a check mark indicates language deleted. By comparing each section of Senate Bill Number 2117 and the current practice, the changes to current law are easily identified.

The above referenced section 47 of the Uniform School Law provided for the repeal of 23 sections, including § 37-7-611. The booklet stated that these 23 sections "which provide for the creation and operation of municipal separate school districts, are hereby repealed."

Section 52 of the Uniform School Law amended § 37-7-103. This provision was specifically discussed in both the cover memorandum accompanying the submission and the booklet. The cover memorandum provided:

> Section 52 amends Section 37-7-103 . . . [and] sets forth that . . . the school board of any school district may abolish such existing district or reorganize, change or alter the boundaries of any such district. Additionally, the school board with the consent of the school board of the district involved may add to such school district any part of the school district adjoining same or may detach territory from such school district and annex the same to an adjoining district. The present law enables the county board of education to create, alter or abolish any school districts of such county, other than the municipal separate school districts. In addition, the county board of education with the consent of the board of trustees of the municipal separate school district involved

> may add to such municipal separate school districts any part of the county adjoining same or may detach territory from such municipal separate school district and annex same to an adjoining district in the county school system.

On August 29, 1986, the USAG advised the MAG that he did "not interpose any objection to the voting changes occasioned by Senate Bill No. 2117 (1986), *as identified in your July 22, 1986, letter.*" (Emphasis added.) The letter concluded:

> We note that several of the provisions of Senate Bill No. 2117 (1986) authorize officials of the political subdivisions of the State to make changes affecting voting which are viewed as enabling legislation. Therefore, local officials are not relieved of their responsibility to seek preclearance, pursuant to the requirements of section 5, of any changes effecting voting (*e.g.*, changing voting precinct lines, polling places, special election dates and procedures, boundary changes, etc.) which are adopted as a result of the provisions of Senate Bill No. 2117. 28 C.F.R. 51.14.

The State concedes that the USAG's letter raised doubt about whether the preclearance included provisions other than those 13 specifically listed in its cover memorandum. Therefore, in December 1987, the MAG sought an affirmative preclearance of § 47 insofar as it repealed Miss. Code Ann. § 37-7-611. In the State's resubmission, it reserved the right to object to § 47 being subject to preclearance. The memorandum accompanying the resubmission further stated:

> It is the automatic expansion of the school district which has been repealed by the instant submission. The option to expand however, is not foreclosed. Section 52, of the Chapter 492 of the 1986 Laws of Mississippi (precleared by the

> United States Justice Department on August 29, 1986) provides that the school board of any school district may abolish such existing district or reorganize, change or alter the boundaries of any such school district.

On February 29, 1988, the USAG requested additional information concerning the repeal of § 37-7-611. The State responded; and on March 31, 1989, the USAG objected to the implementation of § 47 of the Uniform School Law insofar as it repealed § 37-7-611. The State requested reconsideration; and by letter dated May 25, 1990, the USAG declined to withdraw his original objection, stating in part:

> It is well-established that to trigger Section 5 review a covered jurisdiction must submit a voting change to the Attorney General in an "unambiguous and recordable manner." . . . [T]he prior submission of the Uniform School Law . . . identified specific voting changes adopted by those statutes, but . . . [the] submission contained [no] reference to the voting changes which the state now claims were precleared. Section 5, as interpreted by the courts and our submission guidelines, plainly fixes the responsibility for identifying voting changes on the state, not the United States Attorney General, yet the state appears to be arguing . . . that the Attorney General should have uncovered voting changes of which the state itself seemingly was unaware at the time the prior submissions were made.

III.

Rule 56 provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The

language of Rule 56 "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

A.

The intervenors and defendants raise several issues which must be addressed before consideration of the § 5 issues.

1.

The defendants and Lamar County assert that no relief can be granted against the Governor or the MAG because they have no duty to administer laws concerning alteration or definition of school district boundaries. Section 5 provides that state enactments may not be enforced unless they have "been submitted by the *chief legal officer* or other appropriate official of such State or subdivision to the [United States] Attorney General . . . ." 42 U.S.C. § 1973c (emphasis added).

The primary issues in this case are whether the statutes are covered by § 5 and, if so, whether they have been precleared. In Mississippi, the attorney general is "the chief legal officer and advisor for the state." Miss. Code Ann. § 7-5-1 (1972). The Attorney General is a proper party to this action. The Governor, however, is not responsible for preclearance. The Act uses the phrase chief legal officer or other appropriate state official. Because the MAG is the chief legal officer, no other state official is required

to act. The Governor has no statutorily imposed responsibility to ensure that statutes are precleared.[3] Accordingly, he will be dismissed from this action.

2.

The intervenors contend that the plaintiffs lack standing to pursue their claim, because the statutes do not result in a change in voting affecting the Board of Trustees of the City school district. Whether plaintiffs have standing is directly related to whether these statutes are § 5 changes in voting; and as discussed *infra*, they are. To have standing, the plaintiffs must have a "distinct and palpable injury" and a "fairly traceable" causal connection between the claimed injury and the challenged conduct of the defendant. *Warth v. Seldin*, 422 U.S. 490, 501 (1975) and *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261 (1977); *see also Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72 (1978). The Act extends to States and the subdivisions thereof. "It is consistent with the broad purpose of the Act to allow the individual citizen standing to insure that his city or county government complies with the § 5 approval requirements." *Allen v. State Bd. of Elections*, 393 U.S. 544, 557 (1969). In *Allen*, the Court further stated:

> [T]he major purpose of the Act indicates that appellants may seek a declaratory judgment that a new state enactment is governed by § 5. Further, after proving that the State has failed to submit the covered enactment for § 5 approval, the private party has standing to obtain an injunction against further enforcement, pending the

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[3] Moreover, the Lamar and Forrest County Boards and Trustees have intervened in the suit. To the extent administration or enforcement of the statutes in issue were required, such relief could be directed to these parties.

State's submission of the legislation pursuant to § 5.

Id. at 555.

The plaintiffs are residents and registered voters in the City and are members of the Board of Trustees of the City school district. They allege that if the statutes continue to be enforced, voters in the annexed territory who are not residents of the City school district will elect the City mayor and council members who, in turn, will select the trustees of the City school board. The plaintiffs allege a distinct injury under the Act which is directly traceable to the defendants' alleged failure to comply with the requirements of § 5. As noted by the Court in *Allen*, § 5 "might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition." *Id.* at 557. The plaintiffs have standing.

3.

The state defendants contend that the action is barred by the Eleventh Amendment, asserting that only the USAG may sue a State pursuant to the Act. This argument is without merit. The Supreme Court in *Allen*, discussed *supra*, held that private citizens may bring an action under § 5.

Lamar County argues that the action is barred by the Eleventh Amendment, pursuant to *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984). But *Pennhurst* concerned the failure of state officials to carry out their duties under *state, not federal*, law; the plaintiffs' claim concerns failure to adhere to federal law. Furthermore, as is more than clearly established, Eleventh Amendment immunity does not bar actions for injunctive relief against state officials on the basis of federal law under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908).

4.

The intervenors also contend that the case is not ripe for decision, because a 1966 City annexation into Lamar

County was never precleared by the USAG.[4] (The other annexations were precleared.) The 1966 annexation was the basis for all subsequent annexations, because they are contiguous to that annexation. Under Mississippi law, annexations must be "adjacent" to the municipality. Miss. Code Ann. § 21-1-27 (1972).

The status of the 1966 annexation does not affect our jurisdiction to consider whether the statutes in issue are covered by the Act and, if so, whether they have been precleared. The "basic rationale [of the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). The statutes in issue have been passed by the Mississippi Legislature and are being enforced. The case is ripe for decision.

5.

We must also consider what effect, if any, to give the Mississippi Supreme Court's thorough and well reasoned decision in *Greenville Public School District*. We agree with the Mississippi Supreme Court that it has concurrent jurisdiction to adjudicate certain § 5 issues. *Tafflin v. Levitt*, ___ U.S. ___, 110 S.Ct. 792 (1990). State courts have jurisdiction to hear federal claims unless divested "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Id.* at 795 (quoting *Gulf Offshore Co. v. Mobile Oil Corp.*, 453 U.S. 473, 478 (1981)). In *Hathorn v. Lovorn*, 457 U.S. 255,

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[4] The Lamar County intervenors stated that they were contemplating an amendment to their Answer for leave to file a third party complaint against the City challenging the validity of the 1966 annexation. They have not done so.

269 (1982), the Supreme Court held "that the Mississippi courts had the power to decide whether § 5 applied to the change . . . ."

> Congress prohibited . . . jurisdictions from implementing any change in voting procedure without obtaining preclearance under § 5. Granting state courts the power to decide, as a collateral matter, whether § 5 applies to contemplated changes in election procedures will help insure compliance with the preclearance scheme.

Id. at 268.

However, the effect federal courts give to state court determinations of federal claims is a separate inquiry from that of concurrent jurisdiction. In short, federal courts are not bound by state court decisions on matters of federal law. *See, e.g., Standard Oil Co. v. Johnson*, 316 U.S. 481, 483 (1942); *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 470-71 (1942) (Jackson, J., concurring). Therefore, the state court's interpretation of the § 5 preclearance issues is not binding on this court. Furthermore, the doctrines of res judicata and collateral estoppel are inapplicable, because the plaintiffs and the defendants were not parties to the state court action. *See Hathorn v. Lovorn*, 457 U.S. at 268 n.23 ("Common notions of collateral estoppel suggest that the state proceedings . . . would not bind other interested persons who did not participate in them . . . . Persons dissatisfied with a state court's collateral resolution of a § 5 issue in proceedings involving other parties, therefore, are likely to be able to litigate the issue anew in federal court."). Moreover, § 21-1-59 was not in issue in *Greenville Public School District.*

Conversely, a state supreme court's interpretation of a state statute is binding on a federal court. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983) ("the views of the State's highest court with respect to state law are binding on the federal courts"); *Brown v. Ohio*, 432 U.S. 161, 167 (1977)

("Ohio courts 'have the final authority to interpret . . . that State's legislation.' ") (quotation omitted). Accordingly, the Mississippi Supreme Court's interpretation of the Uniform School Law is binding on this court.

B.

The primary issues involved in this case have been summarized by the Supreme Court as follows:

> The only questions in an action alleging a violation of the § 5 preclearance requirement are (1) whether a change is covered by § 5, (2) if the change is covered, whether § 5's approval requirements have been satisfied, and (3) if the requirements have not been satisfied, what relief is appropriate.

McCain v. Lybrand, 465 U.S. 236, 250 n. 17 (1984). Whether the amendments and repealer "had a discriminatory purpose or effect is not an issue at this stage of the § 5 litigation: that question must be initially decided by the District Court for the District of Columbia or the Attorney General." *Id.*

1.

First, we must address plaintiffs' contention that the USAG's determinations that the statutes are covered by § 5 and have not been precleared are not subject to review by this court. The Supreme Court has held that only the USAG's "exercise of discretion . . . or his failure to object within the statutory period" is unreviewable. *Morris v. Gressette*, 432 U.S. 491. 500-07 (1977). In *Morris*, the Court invalidated an untimely *nunc pro tunc* objection by the USAG to a South Carolina reapportionment plan. The USAG had failed to enter a timely objection to the submission. "[C]ompliance with § 5 is measured solely by the *absence*, for whatever reason of a timely objection on the

part of the Attorney General." *Id.* at 502 (emphasis in original). Although the USAG's decision not to object is not reviewable, this does not preclude a consideration of whether the statutes in issue are covered by § 5 and were precleared, especially where, as here, there was arguable preclearance of the entire Uniform School Law on the first submission (1986).

2.

Whether these statutes are covered by § 5 is a legal question and therefore appropriate for summary judgment. The scope of § 5 is broad. It is intended to reach "any state enactment which altered the election law of a covered State in even a minor way." *Allen*, 393 U.S. at 566. There are no statutory exceptions to § 5, "thus indicating an intention that all changes, no matter how small, be subjected to § 5 scrutiny." *Perkins v. Matthews*, 400 U.S. 379, 387 (1971) (quoting *Allen*, 393 U.S. at 568). The regulations in effect in 1986 when the Uniform School Law was submitted for preclearance provided:

> Any change affecting voting, even though it appears to be minor or indirect, returns to a prior practice or procedure, ostensibly expands voting rights, or is designed to remove the elements that caused the objection by the Attorney General to a prior submitted change, must meet the Section 5 preclearance requirement.

28 C.F.R. § 51.11 (1986) (currently codified at 28 C.F.R. § 51.12 (1990)).

The statutes in issue, at the very least, indirectly affect political subdivision boundaries. The regulations list examples of changes affecting voting; one is "[a]ny change in the constituency of an official or the boundaries of a voting unit (e.g., through redistricting, annexation, deannexation, incorporation, reapportionment . . .)." 28 C.F.R. 51.12 (1986) (currently codified at 28 C.F.R. § 51.13 (1990)).

The trustees of a municipal separate school district in general are elected "by a majority of the governing authorities of the municipality . . . ." Miss. Code Ann. § 37-7-203 (1972); Hattiesburg Code of Ordinances, Art. XXII, School Board (1989). The governing authorities of the City, the mayor and council, are "elected from the municipality at large in accordance with the general laws for the holding of municipal elections." Hattiesburg Code of Ordinances, Art. I, §§ 2-2 and 2-4 (1989). Those residing in the annexed areas may vote in municipal elections if a proper ordinance is adopted by the council. Miss. Code Ann. § 21-8-7(4)(d) (1972).

Prior to the 1977 and 1978 amendments to § 21-1-59 and the 1986 repeal of § 37-7-611, municipal school district lines expanded to the same extent as the municipal annexations; now, under § 37-7-103, and the amendments to § 21-1-59, this result is not automatic. Here, the result is that citizens who reside in the Lamar and Forrest County annexations may still be in the county school districts. These citizens continue to vote for the Lamar and Forrest County Boards of Education; but they also vote for the City mayor and council, who in turn select the City board of trustees of the City school district. Therefore, at least an indirect change in voting has occurred.

Furthermore, it is significant that the USAG, who has considerable expertise in this area, considered these statutes to be "changes" within the meaning of § 5. In his March 31, 1989 objection to the repeal of § 37-7-611, he stated:

> [T]he repeal of Section 37-7-611, by allowing for annexations to cities without the concomitant expansion of municipal school district boundaries, is likely to create a class of city voters (for the most part predominantly white) who will not reside in the city school system yet may vote for

> the city governing body, which under Mississippi law, appoints the city school board.

And, in that same letter, he also found that the 1977 amendment to § 21-1-59 "occasioned a similar change concerning the modification of municipal school district boundaries where a municipality annexes territory outside its principal county." *See Dougherty County, Ga. Bd. of Educ. v. White*, 439 U.S. 32, 39 (1978) ("Given the central role of the Attorney General in formulating and implementing § 5, [his] interpretation of its scope is entitled to particular deference."); *Lucas v. Townsend*, 698 F. Supp. 909, 911 (M.D.Ga. 1988) ("Though not binding upon this . . . court, the Attorney General's interpretation of both the scope of Section 5 and his regulations promulgated thereunder is entitled to particular deference.").

Accordingly, we hold that the statutes do fall within the broad sweep of § 5. The vote from the annexed area could have an impact on the selection of the City school board. The vote of the City voters who reside in the municipal school district would be diluted by the vote of those residents in the annexed area who remain a part of the county school district. This constitutes the requisite change in voting.

3.

We next determine whether these statutes have been precleared. As stated, in 1986 the Uniform School Law was submitted to the USAG "in its entirety" and no objection was interposed within the statutory 60 day period. The regulations then in effect did not require jurisdictions to submit a copy of the prior law being amended or repealed. 28 C.F.R. § 51.25 (1986).[5]

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[5] The current regulation requires "[a] copy of any ordinance, enactment, order, or regulation embodying the voting practice that is proposed to be repealed, amended, or otherwise changed." 28 C.F.R. § 51.27 (1990).

The regulations in effect in 1986 did require the submitting authority to include "a clear explanation of the change explaining the difference between the submitted change and the prior law or practice" if the change affecting voting was not readily apparent on the face of the document. 28 C.F.R. § 51.25(b)(1986). Those regulations also imposed a duty on the USAG to request additional information if the submission was incomplete:

> If a submission does not satisfy the requirements of § 51.25, the Attorney General shall request further information as is necessary from the submitting authority. . . .

28 C.F.R. § 51.35 (1986). The USAG did not make such a request.

As discussed *supra*, the State explained that the Uniform School Bill was submitted in its entirety and was a reorganization and streamlining of the Mississippi school system. The plaintiffs contend that only those provisions which were specifically identified in the cover memorandum were precleared, asserting that the USAG's August 1986, letter which states that there was no objection to the voting changes "as identified in your July 22, 1986 letter" indicates that the USAG precleared only those particular sections. Moreover, the subsequent May 1990 USAG letter stated:

> It is well-established that to trigger § 5 review a covered jurisdiction must submit a voting change to the Attorney General in a "unambiguous and recordable manner." . . . [T]he prior submission of the Uniform School Law . . . identified specific voting changes adopted . . . but . . . [the] submission contained [no] reference to the voting changes which the state now claims were precleared.

The letter further stated that the responsibility is on the submitting jurisdiction to identify voting changes, and that

the USAG should not be required to uncover "voting changes of which the state itself seemingly was unaware at the time the prior submissions were made."

The plaintiffs also charge the state defendants with being inconsistent, because their statement that they submitted the entire bill for preclearance is in contradiction to the December 30, 1987 letter of resubmission, in which the MAG stated that "[t]he *major part* of Chapter 492, as it deals with the Voting Rights Act of 1965 . . . has already been precleared" by the Justice Department on August 29, 1986. (Emphasis added.)

The defendants and intervenors respond that the bill was submitted in its entirety, and furthermore, that the booklet accompanying the submission explained that § 47 repealed those sections (including 37-7-611) governing the creation and operation of municipal school districts. They maintain that the entire bill was precleared by the USAG's failure to object, and that subsequent objection in 1989 and 1990 was of no effect.

In *Morris*, the Court held that the USAG's belated attempt to object to South Carolina's reapportionment plan was invalid:

> According to the terms of § 5, a covered jurisdiction is in compliance pursuant to the latter alternative [USAG method] once it has (i) filed a complete submission with the Attorney General, and (ii) received no objection from that office within 60 days. . . . [C]ompliance with § 5 is measured solely by the *absence*, for whatever reason of a timely objection on the part of the Attorney General.

432 U.S. at 502 (emphasis in original). The Court further stated that

> [i]n light of the potential severity of the § 5 remedy, the statutory language, and the legislative

> history, we think it clear that Congress intended to provide covered jurisdictions with an expeditious alternative to declaratory judgment actions. . . . The extraordinary remedy of postponing the implementation of validly enacted state legislation was to come to an end when the Attorney General failed to interpose a timely objection based on a complete submission.

Id. at 504. And, the Court noted that the USAG's failure to act would not preclude a subsequent action to enjoin enforcement of the legislation.

Morris stands for the proposition that the USAG's failure to object to a complete submission is final, and any subsequent attempts to object are invalid. Needless to say, the question remaining after *Morris* is what constitutes a "complete submission." In *Allen*, which preceded *Morris*, none of the voting changes were formally submitted to the USAG; but the appellees contended that the USAG was aware of the changes when served with a copy of appellees' briefs in the four consolidated cases. The Supreme Court rejected this argument and held:

> While the Attorney General has not required any formal procedure, we do not think the Act contemplates that a "submission" occurs when the Attorney General merely becomes aware of the legislation, no matter in what manner. . . . A fair interpretation of the Act requires that the State in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act.

393 U.S. at 571.

In *United States v. Board of Comm'rs of Sheffield, Ala.*, 435 U.S. 110 (1978), the city submitted a letter which "sought approval only for the holding of a referendum,"

but did not ask for preclearance of the underlying change that was the subject of the referendum. When the USAG responded, he stated that he interposed no objection to the holding of a referendum. The Supreme Court held that the district court erred in concluding that the USAG approved the underlying change as well. "[T]he purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him." *Id.* at 136.

McCain v. Lybrand, 465 U.S. 236 (1984), concerned a 1966 bill that had never been submitted for preclearance, although a 1971 amendment to the 1966 bill had been precleared. The district court held that (1) the USAG's request for additional information, including a copy of the 1966 statute, indicated that he had considered all aspects of the electoral scheme, including the changes effected in the 1966 Act; or (2) alternatively, that because the 1971 submission retained the changes effected by the 1966 Act, the lack of objection to the 1971 submission necessarily constituted approval of those changes as well and rendered moot the failure to preclear the 1966 Act. The Supreme Court disagreed:

> To the extent there was any ambiguity in the scope of the preclearance request, the structure and purpose of the preclearance requirement plainly counsel against resolving such ambiguities in favor of the submitting jurisdiction in the circumstances of this case. The preclearance process is by design a stringent one; it is predicated on the congressional finding that there is a risk that covered jurisdictions may attempt to circumvent the protections afforded by the Act; the burden of proof . . . is placed upon the covered jurisdiction. . . .

Id. at 257.

Allen, Sheffield, and *McCain*, however, are factually distinguishable from this case. The MAG unambiguously submitted the Uniform School Law "in its entirety." The USAG was advised that only particular sections which dealt "primarily" with voting rights were discussed, "even though the complete act is submitted for review." The memorandum explained the comprehensive nature of the submission; and, most importantly, the booklet explained the repeal of § 37-7-611 governing the creation and operation of municipal school districts.

Of even greater significance is both the discussion of § 52 in the cover memorandum and booklet and the undisputed preclearance of that section. Section 52, § 37-7-103, was in effect a replacement for the school districting procedures. Prior to the Uniform School Law, the provisions pertaining to school district boundaries and alterations varied, depending on whether the district was a county, municipal or consolidated school district. The 1986 Uniform School Law created uniformity among the school districts.[6] Section 52 amended § 37-7-103 (which had con-

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[6] Section 37-6-5 was added by § 2 of the Uniform School Law. It provides in part:

> (1) From and after July 1, 1987, all school districts in the State of Mississippi shall have the same prerogatives, powers, duties and privileges as provided in this chapter.
>
> (2) As used in this act, the term "school board" shall mean (a) the county board of education of any countywide school district in this state; and (b) the board of trustees of any municipal separate, special municipal separate, consolidated or line consolidated school district in this state.

Section 37-6-5 was added by § 3:

> Each school district in the state shall be a political subdivision with the name of the district being "_____ School District."

Section 37-6-7 was added by § 4:

> Each school district shall be governed by a school board

cerned changes to school districts by a county board of education) by granting jurisdiction to the school board of *any* school district to alter the boundaries of *any* such district by obtaining the consent of the adjoining school district involved; and the school board was authorized "to detach or add to such school district any part of the school district adjoining same, and . . . may detach territory from such school distinct and annex same to an adjoining district." All references to a county board of education and its authority to alter districts in the county were deleted; all references to a municipal school district and its required consent were deleted.

This view is in accord with the Mississippi Supreme Court's analysis of § 37-7-103:

> Miss. Code Ann. § 37-7-103 . . . was enacted to control the abolition, alteration or creation of school districts after the reform. This statute gives the school board of any school district full jurisdiction, power and authority to alter the boundaries of any school district and requires the mutual consent of adjoining districts in the alteration of abutting boundaries. *All conflicting statutes concerning school boundaries were repealed, including § 37-7-611.*

Greenville Public School District, No. 07-CA-59534 at 3 (Dec. 12, 1990) (emphasis added).

This case is factually similar to *Woods v. Hamilton*, 473 F. Supp. 641 (D.S.C. 1979) (three-judge court). In *Woods*, South Carolina submitted the 1975 Home Rule Act for § 5 approval. The cover letter which accompanied the submission stated in full:

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consisting of five (5) members, selected in the manner provided by law.

> For your consideration under the Voting Rights Act submitted herewith are certified copies of the following Act enacted by the General Assembly and approved by the Governor.
>
> | Ratification Number | Date Approved |
> |---|---|
> | R. 396 | June 25, 1978 |
>
> We would request expeditious consideration of this Act. If additional information is needed, please contact me.

Id. at 644. The court stated that "[i]t is apparent from the above letter that the State submitted the *entire* Home Rule Act to the [USAG] for his consideration within the sixty-day statutory period." *Id.* (Emphasis in original.) The USAG responded and (1) did not expressly object to a referendum provision; (2) reserved the right to object to the implementation of the selected form of government pursuant to the referendum; and (3) was silent on a transfer of powers provision. The court held that *Morris* compelled a finding that the USAG had precleared the complete submission:

> Here, the Attorney General's silence on the transfer of powers in the Home Rule Act clearly dooms his belated attempt to label the assumption of such powers by the county council as an "uncleared change." Whatever may have been the motive of the Attorney General in failing to object to the transfer of powers in his . . . letter, the fact remains that the State submitted the entire Home Rule Act and, under the law, the Attorney General . . . was required to pass on all components of a complete submission at that time.

Id. at 646.

We find that there are no genuine issues of material fact concerning the preclearance, *vel non*, of the entire Uniform School Law of 1986 and hold that it was pre-

cleared in its entirety, including the repeal of § 37-7-611. A uniform act was submitted; by its title alone, the act signalled a massive reorganization of various laws. The submission was complete and unambiguous. And, under *Morris*, the USAG's later objection was of no effect.[7] Accordingly, the defendants and intervenors are entitled to summary judgment on plaintiffs' claim that the repeal of § 37-7-611 is not enforceable.

Likewise, as for § 21-1-59, there are no genuine issues of material fact concerning the preclearance, *vel non*, of the 1977 amendment. The 1977 amendment has not been precleared. The amendment was not submitted until March 23, 1990; and the USAG interposed an objection. The defendants' argument that the approval of the 1978 amendment cured the failure to submit the 1977 amendment for preclearance is without merit. This argument has been specifically rejected by Supreme Court decisions in *McCain* and *Sheffield*, discussed *supra*.

The only provision of the 1978 amendment to § 21-1-59 which was precleared was the referendum provision and not the "extends into or further extends" language now in issue. The MAG's December 30, 1980, cover letter stated that "[f]rom the wording of the language as amended it appears that this amendment would apply only to Jones County." This language pertains to the referendum provision. The Attorney General's March 1981 response is clear:

> This is in reference to House Bill No. 1092 . . . which provides for a referendum for municipalities in certain counties to determine whether a municipal expansion shall affect the public school system in the annexed area. . . . The Attorney

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[7] Because we find that the submission was complete, we need not decide whether § 37-7-611 was precleared by implication, due to the undisputed preclearance of § 37-7-103.

> General does not interpose any objection to the change in question.

The USAG response is limited to the referendum issue and that is the only provision which was precleared.

We hold, therefore, that the 1977 and 1978 amendments in issue to § 21-1-59 have not been precleared. Accordingly, these amendments are unenforceable. Therefore, the plaintiffs are entitled to summary judgment on their claim that the 1977 and 1978 amendments in issue to § 21-1-59 are not enforceable.[8]

THEREFORE, IT IS ORDERED:

1. Ray Mabus, the Governor of Mississippi, is dismissed from this action;

2. Summary Judgment is awarded plaintiffs on their claim that the 1977 and 1978 amendments in issue to § 21-1-59 are not enforceable; and

3. Summary judgment is awarded the defendants and intervenors on plaintiffs' claim that the repeal of § 37-7-611 is not enforceable.

Final Judgment will be entered.

SO ORDERED, this the 1st day of April, 1991.

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[8] The practical effect of this holding is another matter. The amendments to § 21-1-59 provided that the school district in the annexed area will not be affected without consent from the county school board; the amendments to § 21-1-59 were an exception to the automatic extension provision of § 37-7-611. Section 37-1-103, which has been precleared, provides for the same procedure as the 1977 and 1978 amendments to § 21-1-59; and § 37-7-611's repeal has been precleared.

Furthermore, the intervenors contend that we must consider the racial impact and the potential for interference with existing desegregation orders of any relief we grant under § 5. Even if it were proper for us to consider such issues in a preclearance case, § 37-7-103, precleared in 1986, provides for the same result as the amendments in issue to § 21-1-59 which have not been precleared.

/s/ Rhesa A. Barksdale
UNITED STATES CIRCUIT JUDGE

/s/ Tom S. Lee
UNITED STATES JUDGE

/s/ Henry T. Wingate
UNITED STATES CIRCUIT JUDGE

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. 90-1977

Johnny Dupree, et al.,

Appellants,

v.

Mike Moore, Attorney General of Mississippi, et al.

APPEAL from the United States District Court for the Southern District of Mississippi.

THIS CAUSE having been submitted on the statement of jurisdiction and motion to dismiss or affirm,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the United States District Court for the Southern District of Mississippi for further consideration in light of *Clark v. Roemer,* 500 U.S. ___ (1991).

IT IS FURTHER ORDERED that the appellants, Johnny Dupree, et al., recover from Mike Moore, Attorney General of Mississippi, et al., Three Hundred Dollars ($300.00) for their costs herein expended.

March 23, 1992

Clerk's costs: $300.00

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI HATTIESBURG DIVISION

JOHNNY DUPREE, ET AL. PLAINTIFFS

V. CIVIL ACTION NO. H90-0043(W)

MIKE MOORE, ET AL. DEFENDANTS

and

THE LAMAR COUNTY BOARD OF EDUCATION, DEFENDANTS/INTERVENORS

and

FORREST COUNTY SCHOOL DISTRICT, ET AL. DEFENDANTS/INTERVENORS

ORDER

(Filed Oct. 29, 1993)

The matter is before the Three-Judge Court on the motion of the defendants Mike Moore, Attorney General of Mississippi, in his official capacity, and the State of Mississippi, and the defendants/intervenors Lamar County Board of Education and Trustees and Forrest County School District for new trial or to alter or amend the opinion and order of the Three-Judge Court issued August 27, 1993. Also before the Three-Judge Court are the defendants' joint motion for remedy and a joint motion to stay pending appeal.

The defendants filed a notice of interlocutory appeal to the Supreme Court of the United States on September

24, 1993. The Three-Judge Court has reviewed the defendants' motions for new trial or to alter or amend order and the joint motion for remedy and finds that the relief requested pursuant to these motions would intrude needlessly upon the proceedings now pending before the Supreme Court of the United States. Therefore, the Three-Judge Court shall withhold ruling on these motions until such time as the Supreme Court of the United States has reached its conclusion with regard to the matter now on appeal.

The joint motion of the defendants for stay pending appeal is denied.

SO ORDERED AND ADJUDGED this the 29th day of October, 1993.

/s/ Rhesa Barksdale
RHESA BARKSDALE
UNITED STATES CIRCUIT JUDGE

/s/ Tom S. Lee
TOM S. LEE
UNITED STATES DISTRICT JUDGE

/s/ Henry T. Wingate
HENRY T. WINGATE
UNITED STATES DISTRICT JUDGE

Dupree v. Moore, H90-0043

APPENDIX I

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

January 18, 1994

Mr. John L. Maxey II
Suite 410 Heritage Bldg.
P.O. Box 3977
Jackson, MS 39207-3977

Re: Mike Moore, Attorney General of Mississippi, et al.
v. Johnny Dupree, et al.
No. 93-835

Dear Mr. Maxey:

The Court today entered the following order in the above entitled case:

The appeal is dismissed for want of jurisdiction.

Very truly yours,

/s/ William K. Suter
William K. Suter, Clerk

APPENDIX J

STATE OF MISSISSIPPI
[SEAL]
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July 22, 1986

Honorable William Bradford Reynolds
Assistant Attorney General
Civil Rights Division
United States Department of Justice
HOLC Building Room 920
320 First Street, N. W.
Washington, D. C. 20534

Re: Submission of Senate Bill Number 2117, Chapter Number 492, Laws of Mississippi, 1986 Regular Session, An Act Creating the Mississippi Uniform School Law of 1986

(Expedited Consideration Requested)

Dear Mr. Reynolds:

Please find enclosed herein the above referred legislation submitted pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973(c), to the Attorney General of the United States.

Expedited consideration of this submission will be greatly appreciated.

Very Truly yours,

/s/ Edwin Lloyd Pittman
Edwin Lloyd Pittman
Attorney General

/jw
enclosure

SUBMISSION UNDER SECTION 5 OF THE VOTING RIGHTS ACT OF 1965 AS AMENDED, 42 U.S.C. § 1973

TO: The Attorney General of the
United States of America
The Honorable Edwin Meese, III

SUBMISSION OF SENATE BILL NUMBER 2117, CHAPTER 492, LAWS OF MISSISSIPPI, 1986 REGULAR SESSION, AN ACT CREATING THE MISSISSIPPI UNIFORM SCHOOL LAW OF 1986

EXPEDITED CONSIDERATION REQUESTED

Pursuant to Section 5 of the Voting Rights Act of 1965, as amended and extended, 42 U.S.C. § 1973(c) (hereinafter referred to as Section 5), and the United States Department of Justice's Procedures for the administration of Section 5 of the Voting Rights Act of 1965, as amended, 28 C.F.R. §§ 51.1 *et seq.* (1984), the State of Mississippi, by and through the Attorney General of the State of Mississippi, Edwin Lloyd Pittman, respectfully submits to the Attorney General of the United States, Senate Bill number 2117, Chapter Number 492, Laws of Mississippi, 1986 Regular Session, (hereinafter referred to as Senate Bill Number 2117), which is an act creating the Mississippi Uniform School Law of 1986. In making this submission, the State of Mississippi hereby expressly reserves and does not waive any and all objections it may have concerning whether Senate Bill 2117 is subject to the preclearance requirements of Section 5. For this submission, the State of Mississippi respectfully states as follows:

28 C.F.R. §§ 51.25(a).

The Attorney General of the State of Mississippi submits for preclearance under Section 5, a certified copy of Senate Bill Number 2117, Chapter Number 492, Laws of Mississippi, 1986 Regular Session, an act creating the Mississippi Uniform School Law of 1986, attached as Exhibit "A". A

copy of the final passage of roll call votes on Senate Bill number 2117 of the Senate and the House of Representatives is attached as Exhibit "B". Also enclosed as Exhibit "C" is a looseleaf booklet entitled "Senate Bill Number 2117—Comparison of Current Law and New Law" which merely sets forth each section of the current law followed by each applicable section of Senate Bill Number 2117 for explanatory purposes.

28 C.F.R. § 51.25(b).

This submission is cited as the "Mississippi Uniform School Law of 1986" and is submitted to the Attorney General of the United States in its entirety. The act accomplishes a reorganization and streamlining of laws which govern the operation, financing, and administration of the public schools in Mississippi. Senate Bill number 2117 is reform legislation supplemental to and a logical extension of the Education Reform Act of 1982, adopted by the Mississippi Legislature in 1982. The Education Reform Act mandated public kindergartens statewide, revised teacher and administrator certification requirements, mandated performance based school accreditation and required attendance of administrators in school management institutes, among many other provisions. For the sake of brevity, the submission will only set forth the particular sections which deal primarily with voting rights even though the complete act is submitted for review.

Section 9 amends Section 37-7-301 of the Mississippi Code Annotated (Supplement 1985) and sets out new law in subparagraphs (w)(i) and (w)(ii) for the authority of school boards to lease a school building. Procedurally, the school board will be required to publish notice of the resolution adopted by the school board to lease the building for three (3) consecutive weeks with the first publication being at least thirty (30) days prior to the date of action by the school board on the lease. If no petition requesting an election is filed prior to such meeting, then the school

board may proceed to lease a school building. However, if a petition is filed with the school board prior to the meeting and is signed by not less than twenty percent (20%) or fifteen hundred (1500), whichever is less, of the qualified voters of the school district involved, then an election shall be held on the question of authorizing the school board to lease a school building. If at least three-fifths ($^3/_5$) of the qualified electors of the school district vote in favor of the leasing of a school building, then the school board shall proceed to lease a school building. There are two versions of the Amended Section 37-7-301 of the Mississippi Code Annotated (Supplement 1985) presented in Section 9 with the first version effective as of April 15, 1986 and the second version effective as of July 1, 1987. The above described election feature in the new leasing language is identical in both versions.

Section 25 amends Section 37-7-409 of the Mississippi Code of 1972. Subsection (3) authorizes the levy of millage to fund the construction of a school building or facility constructed jointly with another school district. Such joint construction is authorized by Subsections (1) and (2). The present law requires publication of the resolution of intent to make the levy adopted by the school board in a newspaper having general circulation in the county. If a petition is filed by twenty percent (20%) of the qualified electors of the county then an election shall be held on the question of levying the millage. There must be approval of the levy by a majority of the qualified electors of the county before the millage is levied. The amendment contained in Subsection (3) of Section 25 sets forth that the resolution of intent is to be published in a newspaper having general circulation in the school district rather than the county and that if a petition is filed, it must be signed by the lesser of fifteen hundred (1500) or twenty percent (20%) of the qualified voters of the school district, rather than the county, in order to call an election. If three-fifths ($^3/_5$) of the qualified electors of the school district, rather

than a majority of the county, vote to approve the levying of the additional taxes, then the levy shall be made within the manner, form and time required by law.

Section 52 amends Section 37-7-103 of the Mississippi Code of 1972. Section 52 sets forth that after July 1, 1987, the school board of any school district may abolish such existing district or reorganize, change or alter the boundaries of any such district. Additionally, the school board with the consent of the school board of the district involved may add to such school district any part of the school district adjoining same or may detach territory from such school district and annex same to an adjoining district. The present law enables the county board of education to create, alter or abolish any school districts of such county, other than the municipal separate school districts. In addition, the county board of education with the consent of the board of trustees of the municipal separate school district involved may add to such municipal separate school districts any part of the county adjoining same or may detach territory from such municipal separate school district and annex same to an adjoining district in the county school system.

Section 53 amends Section 37-7-105 of the Mississippi Code of 1972. This section provides that when a school board abolishes, alters or reorganizes a school district without a petition, a publication of such order must be published in a newspaper having general circulation in such district(s). If no newspaper of such circulation is published in the school district then the order shall be posted in three (3) public places in the school district. If no petition is filed, said order shall become final. However, if a petition signed by twenty percent (20%) of the qualified voters of any school district reorganized, altered or abolished is filed with the school board then an election shall be held on the question of whether or not such district or districts shall be reorganized, altered or abolished. If a majority shall approve the order of the school board then such order

shall become final. There is very little change from the present law to the amended version. The only changes are the allowance of the reorganization of a school board as opposed to the county board of education.

Section 54 amends Section 37-7-107 of the Mississippi Code of 1972 and provides that if a petition signed by two-thirds ($^2/_3$) of the qualified electors of an existing school district is filed with the school board requesting such district be abolished then the school board shall enter an order abolishing such school district. The order shall become final on a date fixed by the school board not later than July 1 next succeeding the date of such order. The only significant change is that the present law used the terminology of county board of education as opposed to school board.

Section 55 amends Section 37-7-109 of the Mississippi Code of 1972 by setting forth that if a petition signed by a majority of the qualified electors filed with the school board requesting that said described territory be taken from such existing district and annexed to an adjacent district, or reorganized into a new school district, then the school board with the approval of the school board of the district to which such territory is to be annexed shall have the power and authority to take such territory from the existing district and annex same to the adjacent district, or to create a new school district of such specifically described territory. The remainder of Section 55 is the existing language in Section 37-7-109 with the exception that the term school board is used in place of county board of education.

Section 56 amends Section 37-7-111 of the Mississippi Code of 1972. This section sets forth that when any school district is abolished or altered under the provisions of the act, the abolition or alteration shall not impair or release the property of such school district from liability for the payment of the bonds or other indebtedness of such district

and it is the duty of the board of supervisors to levy taxes on the property of the district abolished or altered from year to year until the indebtedness is fully paid. The only change in that particular section is the inclusion of the terminology altered and alteration.

Section 153 amends Section 37-41-95 of the Mississippi Code Annotated (Supplement 1985) which sets forth certain requirements as to the manner of issuance and form of bonds for school buses and transportation equipment. Present law provides that these bonds shall be issued by either the governing authorities of the county or the municipality depending upon the location of the school district and shall be issued in accordance with Sections 19-9-1 through 19-9-31 or Sections 21-33-301 through 21-33-329 governing issuance of general obligation bonds of the county or city. Other sections of Senate Bill Number 2117 transfer authority for issuing all school bonds from the county or city to the school district. To reflect this change in authority for the issuance of school bonds, Section 37-41-95 is amended by Section 153 to provide that these transportation bonds shall be issued in accordance with Sections 37-59-1 through 37-59-45 of the Mississippi Code Annotated which are the statutes governing issuance of general obligation school bonds. Section 37-59-17 is amended by Section 173 of Senate Bill Number 2117, however, the three-fifths ($^3/_5$) of the qualified electors approval provision is unchanged, therefore, the three-fifths ($^3/_5$) of the qualified electors provision in Section 153 is included for explanatory purposes.

Section 163 amends Section 37-57-105 of the Mississippi Code Annotated (Supplement 1985) which authorizes levy of taxes for the support of the respective school districts. Present law establishes that municipal districts present their funding need to the municipal governing authorities and the authorities shall levy sufficient millage, wherein, county districts present their funding need to the county governing authorities and the authorities may levy suffi-

cient millage. Section 163 amends in pertinent part those provisions relating to the levying authority for the school district by providing that the district shall levy sufficient millage. If the ad valorem tax effort in dollars requested by the school district for the fiscal year exceeds the next preceding fiscal year's ad valorem tax effort in dollars by more than seven percent (7%) but not more than ten percent (10%) then the school board must publish notice for three (3) consecutive weeks in the newspaper in the school district. Further, an election must be held on the amount of the increase in excess of seven percent (7%) but not more than ten percent (10%) if a petition is filed and signed by the lesser number of twenty percent (20%) or fifteen hundred (1500) of the qualified electors of the school district. If a majority of the electors vote in favor of the question then the stated increase requested by the school board shall be approved.

Section 164 amends Section 37-57-107 of the Mississippi Code Annotated (Supplement 1985) which provides that the aggregate receipts from taxes levied for school district purposes shall not exceed the aggregate receipts from those sources during the next preceding fiscal year plus an increase not to exceed ten percent (10%). Section 57-7-107 authorizes tax revenue to exceed ten percent (10%) if an election is held in the school district and a majority of the electors of the district actually vote and if a majority of those voting in the election and approve the increase. Section 164 amends this vote requirement to establish the required vote to be three-fifths ($^3/_5$) of those voting in the election as opposed to the majority of those voting if a majority of the registered voters actually vote.

Section 170 amends Section 37-59-11 of the Mississippi Code of 1972 which sets forth the procedure for the calling of an election on the issuance of bonds. Presently, Section 37-59-11 mandates an election of the question of the issuance of the bonds. The version of Section 170 which is effective until June 30, 1987 mandates an election only if

a petition is filed with the school board calling for an election and is signed by the lesser of fifteen hundred (1500) or twenty percent (20%) of the registered voters of the school district. The version of Section 107 effective after July 1, 1987 reinstates the mandatory election prior to the issuance of school bonds.

Section 185 amends Section 37-59-105 of the Mississippi Code of 1972. Present law authorizes the borrowing of money and the issuance of negotiable notes or certificates of indebtedness and sets forth that an election on the question of incurring such indebtedness shall be held if a petition of twenty percent (20%) of the electors of the school district is filed. If a majority of the electors vote in favor of incurring such indebtedness then the governing authorities shall proceed to issue negotiable notes or certificates of indebtedness. Section 185 amends Section 37-59-105, in pertinent part, to change the required vote to three-fifths ($^3/_5$) of the qualified electors voting in said election.

Section 203 is new law which mandates an election in certain school districts at the November, 1988 general election. Section 203 requires the county governing authorities in any county wherein the position of county superintendent of education remains elective as of July 1, 1986, to publish notice of the election for three (3) consecutive weeks and to hold an election at the general election in November, 1988, on the sole question of whether the superintendent shall remain an elected office or shall be abolished. Present law allows the superintendent of schools to be elected in districts under the designation of county school districts.

28 C.F.R. § 51.25(c).

The person making this submission is Edwin Lloyd Pittman, the Attorney General of the State of Mississippi and the Chief Legal Officer for the State of Mississippi, whose address is Post Office Box 220, Jackson, Mississippi 39205,

and whose telephone number is (601) 359-3680. Lynn Fitch Mitchell, Special Assistant Attorney General, with Attorney General Pittman's staff, should be contacted concerning this submission.

18 C.F.R. § 51.25(d).

The name of the submitting authority and the jurisdiction responsible for the enactment of the statutes under submission is the State of Mississippi.

28 C.F.R. § 51.25(e)

Not applicable.

28 C.F.R. § 51.25(f)

The Legislature of the State of Mississippi was responsible for enacting the statutes under submission.

28 C.F. § 51.25(g).

The legislative power of the State of Mississippi is vested in a legislature which shall consist of a senate and a house of representatives as set forth by Article 4, Section 33 of the Mississippi Constitution. Article 4, Section 59 of the Mississippi Constitution provides that bills may originate in either house and Article 4, Section 62 provides that no amendment to bills by one house shall be concurred in by the other except by a vote of the majority thereof. Article 4, Section 71 denotes that every bill introduced into the legislature shall have a title which clearly indicates the subject matter or matters of the proposed legislation. Further, Article 4, Section 72, sets out that every bill which passes both houses shall be presented to the Governor for his signature; but if he does not approve such bill, he shall return it, with his objections, at which point, both houses shall reconsider such bill and upon a two-thirds ($^2/_3$) vote of each house, it shall become a law.

28 C.F.R. § 51.25(h).

Senate Bill Number 2117 was approved on April 15, 1986.

28 C.F.R. § 51.25(i).

The entire act set forth by Senate Bill Number 2117 shall be in effect after July 1, 1987 as denoted by Section 205. This section further provides that Sections 9, 70, 76, 170, 186 and 188 of the act shall take effect after passage and that Sections 162, 163, 164 and 202 of the act shall take effect after July 1, 1986. This section also provides that Section 203 of the act shall take effect after it is effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended.

28 C.F.R. § 51.25(j).

The Attorney General of Mississippi cannot state that Senate Bill Number 2117 under submission has not yet been enforced or administered because particular sections of such bill are authorized effective as of July 1, 1986. The Attorney General can state that the sections denoted under Senate Bill Number 2117 which are to be effectuated at a later date or upon preclearance from the United States Department of Justice under Section 5 of the Voting Rights Act of 1965, as amended and extended, have not yet been enforced or administered.

28 C.F.R. § 51.25(k).

Senate Bill Number 2117 does affect the entire State of Mississippi.

28 C.F.R. § 51.25(l).

The changes set forth in Senate Bill Number 2117 were made as part of a comprehensive reorganization and restructuring of the laws governing the administration and operation of the public schools of Mississippi. Further, the act grants to the governing boards of the school districts a measure of fiscal independence to meet the funding needs of each respective district. Mississippi schools currently operate under four different kinds of school district with each district having its own system of government and

finance. It appears that if there were only one type of district so that all laws pertaining to districts would apply to each district in the state, rather than special laws for special types of districts, the administration and operation of school districts would be more effective and beneficial to the state.

The act in the entirety with special emphasis placed on the denoted sections establishes no changes in qualifications or registration for voting, procedures for voting absentee ballots, district lines, precincts or polling places. The particular sections with the exception of Section 203 speak primarily to the publication requirements of notice of intent of action of the school board, the procedure for filing a petition, the required number of signatures on the petition to call an election, the number of qualified voters necessary to approve or disapprove action of the school board and the procedure to reorganize or abolish a school district.

Section 203 is new law which mandates an election in school districts in November, 1988, concurrent with the general elections in that year. The election is to be held on the sole question of whether the superintendent shall remain an elected office or whether the elected position shall be abolished and the superintendent shall be appointed by the school board. There is no indication of the number of school districts that will vote to abolish the office of superintendent as an elected position and require the office to be filled by appointment. When a majority of qualified electors vote to abolish such office, the abolishment is to be effective at the end of the regular term of office or whenever a vacancy shall occur in the office.

It would appear that the intention of the legislature was to provide the electors adequate time to consider the referendum and thus make a decision of whether to have an elected superintendent or an appointed superintendent. Section 203 seems to provide, although somewhat un-

clearly, that if the qualified electors vote to abolish the elected office of superintendent then that position is to become an appointed position. Section 203 deals directly with Section 60 of Senate Bill Number 2117 which provides that each school district shall have a superintendent of schools selected in the manner provided by law. Accordingly, the implication is that a superintendent shall be either as an elected official or as an appointed official. Thus, the apparent intention of the legislature is to provide the electors with an opportunity to vote on the issue of whether to have an elected or an appointed superintendent and then implement the chosen position.

28 C.F.R. § 51.25(m).

Senate Bill Number 2117 did not and will not adversely affect racial or language minority groups, did not and will not effect members of racial or language minority groups and does not and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.

28 C.F.R. § 51.25(N).

Not applicable.

28 C.F.R. § 51.25(O).

Senate Bill Number 2117, the comprehensive set of statutes creating the Mississippi Uniform School Law of 1986, under submission has not yet been precleared by the United States Department of Justice.

28 C.F.R. § 51.25(p).

This submission does not concern a redistricting, annexation or other complex change; therefore, no further information is supplied as supplemental contents suggested by C.F.R. § 51.26.

Pursuant to 28 C.F.R. § 51.32, the State of Mississippi respectfully requests that this submission be given *expedited consideration.*

If the Attorney General of the United States needs any further information concerning this submission, the State of Mississippi will attempt to supply it.

This, the 22 day of July, 1986

Respectfully submitted,

STATE OF MISSISSIPPI

BY: /s/ Edwin Lloyd Pittman
EDWIN LLOYD PITTMAN, ATTORNEY GENERAL
STATE OF MISSISSIPPI

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for the State of Mississippi

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APPENDIX K

SENATE BILL NUMBER 2117—COMPARISON OF CURRENT AND NEW LAW

INTRODUCTORY NOTE

This booklet sets forth on a section by section basis each section of the current law which has been amended followed by each individual section of Senate Bill Number 2117, Laws of Mississippi, 1986 Regular Session. Where the sections of Senate Bill Number 2117 are new law then only those particular sections will be denoted with no comparison of current law. This section by section comparison provides explanatory materials adequate to disclose the difference between the prior and the proposed law. Each section of Senate Bill Number 2117 which is the version of the bill as sent to the governor is marked to show the changes made in the current law. Underlining indicates language added and a check mark indicates language deleted. By comparing each section of Senate Bill Number 2117 and the current practice, the changes to current law are easily identified.

§ 37-7-301. Powers and duties of boards of trustees.

The boards of trustees of school districts shall have the following powers, authority, and duties in addition to all others imposed or granted by law, to wit:

(a) To organize the schools of the district and to make such division between the high school grades and elementary grades as, in their judgment, will serve the best interests of the school. In the event the board of trustees provides for a high school of six grades, the lower division thereof may be designated as the junior high school and the higher division thereof may be designated as the senior high school, all in the discretion of the board of trustees;

SECTION 9. Section 37-7-301, Mississippi Code of 1972, is amended as follows:

(Through June 30, 1987, this section shall read as follows:)

37-7-301. The boards of trustees of school districts shall have the following powers, authority, and duties in addition to all others imposed or granted by law, to wit:

(a) To organize the schools of the district and to make such division between the high school grades and elementary grades as, in their judgment, will serve the best interests of the school. In the event the board of trustees provides for a high school of six grades, the lower division thereof may be designated as the junior high school and the higher division thereof may be designated as the senior high school, all in the discretion of the board of trustees;

(b) To introduce public school music, drawing, manual training, and other special subjects into either the elementary or high school grades, as the board of trustees shall deem proper;

(c) To be the custodians of the school property and to manage, control, and care for same, both during the school term and during vacation;

(d) To have responsibility for the erection, repairing, and equipping of school facilities and the making of necessary school improvements;

(e) To suspend or expel a pupil for misconduct in the school, upon school buses, on the road to and from school, during recess or upon the school playgrounds;

(b) To introduce public school music, drawing, manual training, and other special subjects into either the elementary or high school grades, as the board of trustees shall deem proper;

(c) To be the custodians of the school property and to manage, control, and care for same, both during the school term and during vacation;

(d) To have responsibility for the erection, repairing, and equipping of school facilities and the making of necessary school improvements;

(e) To suspend or expel a pupil for misconduct in the school, upon school buses, on the road to and from school, during recess or upon the school playgrounds;

(f) To visit each school in the district in a body at least once during the session for the purpose of determining what can be done for the improvement of the school in a general way;

(g) To assist the superintendent, principal, and teachers where necessary for the proper discipline of the school;

(h) To exclude from the schools, children of filthy or vicious habits, and children suffering from contagious or infectious diseases;

(i) To require, upon the recommendation of the state board of health, and the county health officer in whose health jurisdiction the school rests, the vaccination of school children against smallpox, typhoid fever, poliomyelitis or other contagious or infectious diseases and to require chest X-rays as soon as practicable, and to exclude from the schools children who have not been so vaccinated, as soon as practicable. However, the provisions hereof shall not apply to children whose parents or guardians are certified by an officer of their church to be bona fide members of a recognized denomination whose religious teachings require reliance on prayer or spiritual means for healing. It is further provided that no child shall be required to submit to any vaccination where the parent has caused to be filed with the board of trustees a certificate of a physician that such vaccination would be dangerous to the health or safety of such child;

(f) To visit each school in the district in a body at least once during the session for the purpose of determining what can be done for the improvement of the school in a general way;

(g) To assist the superintendent, principal, and teachers where necessary for the proper discipline of the school;

(h) To exclude from the schools, children of filthy or vicious habits, and children suffering from contagious or infectious diseases;

(i) To require those vaccinations specified by the State Health Officer as provided in Section 41-23-37, Mississippi Code of 1972;

(j) To see that fuel and heating are provided in the schools at all times when same are needed;

(k) To authorize the use of the school buildings and grounds for the holding of public meetings and gatherings of the people under such regulations as may be prescribed by said board;

(l) To prescribe and enforce rules and regulations not inconsistent with law or with the regulations of the State Board of Education for their own government and for the government of the schools, and to transact their business at regular and special meetings called and held in the manner provided by law;

(m) To maintain and operate all of the schools under their control for such length of time during the year as may be required;

(j) To see that fuel and heating are provided in the schools at all times when same are needed;

(k) To authorize the use of the school buildings and grounds for the holding of public meetings and gatherings of the people under such regulations as may be prescribed by said board;

(l) To prescribe and enforce rules and regulations not inconsistent with law or with the regulations of the State Board of Education for their own government and for the government of the schools, and to transact their business at regular and special meetings called and held in the manner provided by law;

(m) To maintain and operate all of the schools under their control for such length of time during the year as may be required;

(n) To enforce in the schools the courses of study and the use of the textbooks prescribed by the proper authorities;

(o) To suspend or dismiss pupils when the best interest of the school makes it necessary, and to deny admission to or suspend or dismiss children who are found to be so mentally or emotionally abnormal that their attendance at the school is detrimental to the best interest of the child involved or to the other pupils attending the school;

(p) To make orders directed to the county superintendent of education for the issuance of pay certificates for lawful purposes on any available funds of the district;

(q) To select superintendents, principals, and teachers in the manner provided by law;

(r) To provide and regulate athletic programs and other school activities; and

(s) To join, in their discretion, for the school trustees in their district, any association of school boards and to pay from local funds other than minimum foundation funds, any membership dues.

(n) To enforce in the schools the courses of study and the use of the textbooks prescribed by the proper authorities;

(o) To suspend or dismiss pupils when the best interest of the school makes it necessary, and to deny admission to or suspend or dismiss children who are found to be so mentally or emotionally abnormal that their attendance at the school is detrimental to the best interest of the child involved or to the other pupils attending the school;

(p) To make orders directed to the county superintendent of education for the issuance of pay certificates for lawful purposes on any available funds of the district;

(q) To select superintendents, principals, and teachers in the manner provided by law;

(r) To provide and regulate athletic programs and other school activities; and

(s) To join, in their discretion, for the school trustees in their district, any association of school boards and to pay from local funds other than minimum foundation funds, any membership dues.

(t) To expend local school activity funds, or other available school district funds, other than minimum education program funds, for the purposes prescribed under this paragraph. "Activity funds" shall mean all funds received by school officials in all school districts paid or collected to participate in any school activity, such activity being part of the school program and partially financed with public funds or supplemented by public funds. Activity funds may only be expended for any necessary expenses or travel costs incurred by students and their chaperones in attending any in-state or out-of-state school-related programs, conventions or seminars and/or any commodities, equipment or school supplies which the local school governing board, in their discretion, shall deem beneficial to the official or extracurricular programs of the district, including items which may subsequently become the personal property of individuals, including yearbooks, athletic apparel, book covers and trophies. The local school governing board shall be authorized and empowered to promulgate rules and regulations specifically designating for what purposes school activity funds may be expended, and what type of bookkeeping methods, procedures and auditing shall be utilized in accounting for such funds. The local school governing board shall provide (a) that such school activity funds be audited annually, or (b) that a financial statement for such school activity funds be prepared and spread upon the minutes of the board. The board may utilize the services of a certified public accountant, a public accountant, the State Department of Audit or its own personnel in preparing such audit or financial statement.

(t) To expend local school activity funds, or other available school district funds, other than minimum education program funds, for the purposes prescribed under this paragraph. "Activity funds" shall mean all funds received by school officials in all school districts paid or collected to participate in any school activity, such activity being part of the school program and partially financed with public funds or supplemented by public funds. The term "activity funds" shall not include any funds raised and/or expended by any organization unless deposited with existing activity funds, regardless of whether the funds were raised using school facilities. Organizations shall not be required to make any payment to any school for the use of any school facility if, in the discretion of the local school governing board, the organization's function shall be deemed to be beneficial to the official or extracurricular programs of the school. For the purposes of this provision, the term "organization" shall not include any organization subject to the control of the local school governing board. Activity funds may only be expended for any necessary expenses or travel costs, including advances, incurred by students and their chaperones in attending any in-state or out-of-state school-related programs, conventions or seminars and/or any commodities, equipment, travel expenses, purchased services or school supplies which the local school governing board, in their discretion, shall deem beneficial to the official or extracurricular programs of the district, including items which may subsequently become the personal property of individuals, including yearbooks, athletic apparel, book covers and trophies. Activity funds may be used to pay travel expenses of school district personnel. The local school governing board shall be authorized and empowered to promulgate rules and regulations specifically designating for what purposes school activity funds may be expended. The local school governing board shall provide (a) that such school activity funds shall be maintained and expended by the principal of the school generating

the funds in individual bank accounts, or (b) that such school activity funds shall be maintained and expended by the superintendent of schools in a central depository approved by the board. The local school governing board shall provide ~ that such school activity funds be audited annually. ~ The board may utilize the services of a certified public accountant or the State Department of Audit ~ in preparing such audit. ~ The State Auditor shall prescribe a uniform system of accounting and financial reporting for all school activity fund transactions to be implemented by July 1, 1986;

(u) To contract, on a shared savings, lease or lease-purchase basis, for energy efficiency services and/or equipment as provided for in Section 31-7-14, not to exceed ten (10) years.

SOURCES: Laws, 1982, ch. 466, § 1; 1985, ch. 466, § 1; 1985, ch. 493, § 3, eff from and after July 1, 1985.

(u) To contract, on a shared savings, lease or lease-purchase basis, for energy efficiency services and/or equipment as provided for in Section 31-7-14, not to exceed ten (10) years.

(v) To maintain accounts and issue pay certificates on school food service bank accounts; and

(w)(i) To lease a school building from an individual, partnership, nonprofit corporation or a private for-profit corporation for the use of such school district, and to expend funds therefor as may be available from any non-minimum program sources. The school board of the school district desiring to lease a school building shall declare by resolution that a need exists for a school building and that the school district cannot provide the necessary funds to pay the cost or its proportionate share of the cost of a school building required to meet the present needs. The resolution so adopted by the school board shall be published once each week for three (3) consecutive weeks in a newspaper having a general circulation in the school district involved, with the first publication thereof to be made not less than thirty (30) days prior to the date upon which the school board is to act on the question of leasing a school building. If no petition requesting an election is filed prior to such meeting as hereinafter provided, then the school board may, by resolution spread upon its minutes, proceed to lease a school building. If at any time prior to said meeting a petition signed by not less than

twenty percent (20%) or fifteen hundred (1500), whichever is less, of the qualified electors of the school district involved shall be filed with the school board requesting that an election be called on the question, then the school board shall, not later than the next regular meeting, adopt a resolution calling an election to be held within such school district upon the question of authorizing the school board to lease a school building. Such election shall be called and held, and notice thereof shall be given, in the same manner for elections upon the questions of the issuance of the bonds of school districts, and the results thereof shall be certified to the school board. If at least three-fifths (3/5) of the qualified electors of the school district who voted in such election shall vote in favor of the leasing of a school building, then the school board shall proceed to lease a school building. The term of the lease contract shall not exceed twenty (20) years, and the total cost of such lease shall be either the amount of the lowest and best bid accepted by the school board after advertisement for bids or an amount not to exceed the current fair market value of the school building as determined by the averaging of at least two (2) appraisals by members of the American Institute of Real Estate Appraisers or the Society of Real Estate Appraisers. The term "school building" as used in this item (w) shall be construed to mean any building or buildings used for classroom purposes in connection with the operation of schools and shall include the site therefor, necessary support facilities, and the equipment thereof and appurtenances thereto such as heating facilities, water supply, sewage disposal, landscaping, walks, drives and playgrounds. The term "lease" as used in this item (w)(i) may include a lease/purchase contract.

(ii) If two (2) or more school districts propose to enter into a lease contract jointly, then joint meetings of the school boards having control may be held but no action taken shall be binding on any such school district unless the question of leasing a school building is approved in

each participating school district under the procedure hereinabove set forth in item (w)(i). All of the provisions of item (w)(i) regarding the term and amount of the lease contract shall apply to the school boards of school districts acting jointly. Any lease contract executed by two (2) or more school districts as joint lessees shall set out the amount of the aggregate lease rental to be paid by each, which may be agreed upon, but there shall be no right of occupancy by any lessee unless the aggregate rental is paid as stipulated in the lease contract. All rights of joint lessees under the lease contract shall be in proportion to the amount of lease rental paid by each.

(x) To borrow such funds as may be reasonable and necessary from the federal government, the State of Mississippi or any political subdivision or entity thereof, or any other governmental agency, public interest corporation, or nonprofit entity established or operated to aid school districts in asbestos removal, to be repaid out of any non-minimum program funds; provided, however, that the grant of authority shall in no way be construed to require said boards of trustees to remove asbestos material or substances from any facilities under their control, nor shall there be any liability to said school districts or boards for the failure to so remove such asbestos materials.

(From and after July 1, 1987, this section shall read as follows:)

37-7-301. The school boards of all school districts shall have the following powers, authority and duties in addition to all others imposed or granted by law, to-wit:

(a) To organize and operate the schools of the district and to make such division between the high school grades and elementary grades as, in their judgment, will serve the best interests of the school;

(b) To introduce public school music, art, manual training and other special subjects into either the elementary or high school grades, as the board shall deem proper;

(c) To be the custodians of real and personal school property and to manage, control and care for same, both during the school term and during vacation;

(d) To have responsibility for the erection, repairing and equipping of school facilities and the making of necessary school improvements;

(e) To suspend or to expel a pupil for misconduct in the school, upon school buses, on the road to and from school, during recess or upon the school playgrounds, and to delegate such authority to the appropriate officials of the school district;

(f) To visit schools in the district, in their discretion, in a body for the purpose of determining what can be done for the improvement of the school in a general way;

(g) To support, within reasonable limits, the superintendent, administrative superintendent, principal and teachers where necessary for the proper discipline of the school;

(h) To exclude from the schools students with what appears to be infectious or contagious diseases; provided, however, such student may be allowed to return to school

upon presenting a certificate from a public health officer or duly licensed physician that the student is free from such disease;

(i) To require those vaccinations specified by the State Health Officer as provided in Section 41-23-37, Mississippi Code of 1972;

(j) To see that all necessary utilities and services are provided in the schools at all times when same are needed;

(k) To authorize the use of the school buildings and grounds for the holding of public meetings and gatherings of the people under such regulations as may be prescribed by said board;

(l) To prescribe and enforce rules and regulations not inconsistent with law or with the regulations of the State Board of Education for their own government and for the government of the schools, and to transact their business at regular and special meetings called and held in the manner provided by law;

(m) To maintain and operate all of the schools under their control for such length of time during the year as may be required;

(n) To enforce in the schools the courses of study and the use of the textbooks prescribed by the proper authorities;

(o) To make orders directed to the ~~✓~~ superintendent of ~~✓~~ schools or administrative superintendent for the issuance of pay certificates for lawful purposes on any available funds of the district and to have full control of the receipt, distribution, allotment and disbursement of all funds provided for the support and operation of the schools of such school district whether such funds be derived from state appropriations, local ad valorem tax collections, or otherwise;

(p) To select all school district personnel in the manner provided by law;

(q) To provide and regulate athletic programs and other school activities;

(r) To join, in their discretion, any association of school boards and other public school related organizations, and to pay from local funds other than minimum foundation funds, any membership dues;

(s) To expend local school activity funds, or other available school district funds, other than minimum education program funds, for the purposes prescribed under this paragraph. "Activity funds" shall mean all funds received by school officials in all school districts paid or collected to participate in any school activity, such activity being part of the school program and partially financed with public funds or supplemented by public funds. The term "activity funds" shall not include any funds raised and/or expended by any organization unless deposited with existing activity funds, regardless of whether the funds were raised using school facilities. Organizations shall not be required to make any payment to any school for the use of any school facility if, in the discretion of the local school governing board, the organization's function shall be deemed to be beneficial to the official or extracurricular programs of the school. For the purposes of this provision, the term "organization" shall not include any organization subject to the control of the local school governing board. Activity funds may only be expended for any necessary expenses or travel costs, including advances, incurred by students and their chaperones in attending any in-state or out-of-state school-related programs, conventions or seminars and/or any commodities, equipment, travel expenses, purchased services or school supplies which the local school governing board, in their discretion, shall deem beneficial to the official or extracurricular programs of the district, including items which may subsequently become the per-

sonal property of individuals, including yearbooks, athletic apparel, book covers and trophies. Activity funds may be used to pay travel expenses of school district personnel. The local school governing board shall be authorized and empowered to promulgate rules and regulations specifically designating for what purposes school activity funds may be expended. The local school governing board shall provide (a) that such school activity funds shall be maintained and expended by the principal of the school generating the funds in individual bank accounts, or (b) that such school activity funds shall be maintained and expended by the superintendent of schools in a central depository approved by the board. The local school governing board shall provide that such school activity funds be audited annually. The board may utilize the services of a certified public accountant or the State Department of Audit in preparing such audit. The State Auditor shall prescribe a uniform system of accounting and financial reporting for all school activity fund transactions to be implemented by July 1, 1986;

(t) To contract, on a shared savings, lease or lease-purchase basis, for energy efficiency services and/or equipment as provided for in Section 31-7-14, not to exceed ten (10) years.

(u) To maintain accounts and issue pay certificates on school food service bank accounts; and

(v)(i) To lease a school building from an individual, partnership, nonprofit corporation or a private for-profit corporation for the use of such school district, and to expend funds therefor as may be available from any non-minimum program sources. The school board of the school district desiring to lease a school building shall declare by resolution that a need exists for a school building and that the school district cannot provide the necessary funds to pay the cost or its proportionate share of the cost of a school building required to meet the present needs. The

resolution so adopted by the school board shall be published once each week for three (3) consecutive weeks in a newspaper having a general circulation in the school district involved, with the first publication thereof to be made not less than thirty (30) days prior to the date upon which the school board is to act on the question of leasing a school building. If no petition requesting an election is filed prior to such meeting as hereinafter provided, then the school board may, by resolution spread upon its minutes, proceed to lease a school building. If at any time prior to said meeting a petition signed by not less than twenty percent (20%) or fifteen hundred (1500), whichever is less, of the qualified electors of the school district involved shall be filed with the school board requesting that an election be called on the question, then the school board shall, not later than the next regular meeting, adopt a resolution calling an election to be held within such school district upon the question of authorizing the school board to lease a school building. Such election shall be called and held, and notice thereof shall be given, in the same manner for elections upon the questions of the issuance of the bonds of school districts, and the results thereof shall be certified to the school board. If at least three-fifths (3/5) of the qualified electors of the school district who voted in such election shall vote in favor of the leasing of a school building, then the school board shall proceed to lease a school building. The term of the lease contract shall not exceed twenty (20) years, and the total cost of such lease shall be either the amount of the lowest and best bid accepted by the school board after advertisement for bids or an amount not to exceed the current fair market value of the school building as determined by the averaging of at least two (2) appraisals by members of the American Institute of Real Estate Appraisers or the Society of Real Estate Appraisers. The term "school building" as used in this item (v) shall be construed to mean any building or buildings used for classroom purposes in connection with

the operation of schools and shall include the site therefor, necessary support facilities, and the equipment thereof and appurtenances thereto such as heating facilities, water supply, sewage disposal, landscaping, walks, drives and playgrounds. The term "lease" as used in this item (v)(i) may include a lease/purchase contract.

(ii) If two (2) or more school districts propose to enter into a lease contract jointly, then joint meetings of the school board having control may be held but no action taken shall be binding on any such school district unless the question of leasing a school building is approved in each participating school district under the procedure hereinabove set forth in item (v)(i). All of the provisions of item (v)(i) regarding the term and amount of the lease contract shall apply to the school boards of school districts acting jointly. Any lease contract executed by two (2) or more school districts as joint lessees shall set out the amount of the aggregate lease rental to be paid by each, which may be agreed upon, but there shall be no right of occupancy by any lessee unless the aggregate rental is paid as stipulated in the lease contract. All rights of joint lessees under the lease contract shall be in proportion to the amount of lease rental paid by each.

(w) To borrow such funds as may be reasonable and necessary from the federal government, the State of Mississippi or any political subdivision or entity thereof, or any other governmental agency, public interest corporation, or nonprofit entity established or operated to aid school districts in asbestos removal, to be repaid out of any non-minimum program funds; provided, however, that the grant of authority shall in no way be construed to require said boards of trustees to remove asbestos material or substances from any facilities under their control, nor shall there be any liability to said school districts or boards for the failure to so remove such asbestos materials.

(x) To contract, on a shared savings, lease or lease-purchase basis, for energy efficiency services and/or equipment as provided for in Section 31-7-14, not to exceed ten (10) years;

(y) To employ and fix the duties and compensation of such clerical help, other non-instructional personnel deemed necessary pursuant to the recommendation of the superintendent of schools or the administrative superintendent;

(z) To employ and fix the duties and compensation of such legal counsel as deemed necessary; and

(aa) Subject to rules and regulations of the State Board of Education, to purchase, own and operate trucks, vans and other motor vehicles, which shall bear the proper identification required by law.

§ 37-7-409. Funds for joint construction of buildings or operation of schools.

(1) When any school districts shall be authorized to unite, join and cooperate in the construction, erecting and equipping of a joint school building or school facility or in the joint operation of a school erected, constructed and equipped entirely by one of such districts, any school district so authorized may, with the prior consent and approval of the state educational finance commission, expend in the construction, erecting and equipping of such joint school building or the school building which is to be jointly operated any available state public school building funds, or any available funds derived from bonds issued by such school district for such purpose, or any other funds which are otherwise available to such school district for such purpose, as is set forth and stipulated in the agreement entered into between the school districts involved. Except as is herein specifically provided all provisions of law relative to the construction, erecting and equipping of school buildings, the acquisition of land therefor, and the expenditure of funds for such purposes, shall be fully applicable to any joint school building which has been or is to be constructed, erected and equipped or which is to be operated jointly pursuant to an agreement entered into under the provisions of section 37-7-405.

SECTION 25. Section 37-7-409, Mississippi Code of 1972, is amended as follows:

37-7-409. (1) When any school districts shall be authorized to unite, join and cooperate in the construction, erecting and equipping of a joint school building or school facility

or in the joint operation of a school erected, constructed and equipped entirely by one of such districts, any school district so authorized may, with the prior consent and approval of the State Board of Education, expend in the construction, erecting and equipping of such joint school building or the school building which is to be jointly operated any available state public school building funds, or any available funds derived from bonds issued by such school district for such purpose, or any other funds which are otherwise available to such school district for such purpose, as is set forth and stipulated in the agreement entered into between the school districts involved. Except as is herein specifically provided all provisions of law relative to the construction, erecting and equipping of school buildings, the acquisition of land therefor, and the expenditure of funds for such purposes, shall be fully applicable to any joint school building which has been or is to be constructed, erected and equipped or which is to be operated jointly pursuant to an agreement entered into under the provisions of Section 37-7-405.

(2) When a contract is made and entered into for the construction, erecting and equipping of joint school facilities or the joint operation of school facilities erected, constructed and equipped entirely by one of such districts, as provided in section 37-7-405, and where such contract has been approved by the state educational finance commission, then any funds which are available for the lawful operating and incidental expenses of a school district may be expended by such school district as provided and stipulated in the agreement entered into between the school districts involved (including, but not limited to, funds for payment of tuition, funds payable as a rental upon the use of the building and equipment, and funds for maintenance and incidental costs of operation). The board of supervisors, upon receipt of a certified copy of an order adopted by the board of trustees of any school district in the county requesting same, or the governing authorities of the municipality, upon receipt of a certified copy of an order adopted by the board of trustees of a municipal separate school district requesting same, shall at the same time and in the same manner as other ad valorem taxes are levied, levy an annual tax in the amount fixed in such order as may be required to meet any monetary obligation incurred under such contract. Notwithstanding any statute to the contrary, such number of mills as is necessary to defray any such contractual obligation shall be levied. However, this provision shall in no way be construed to increase the number of mills now reimbursable under the homestead exemption laws of the State of Mississippi

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(2) When a contract is made and entered into for the construction, erecting and equipping of joint school facilities or the joint operation of school facilities erected, constructed and equipped entirely by one of such districts, as provided in Section 37-7-405, and where such contract has been approved by the State Board of Education, then any funds which are available for the lawful operating and incidental expenses of a school district may be expended by such school district as provided and stipulated in the agreement entered into between the school districts involved (including, but not limited to, funds for payment of tuition, funds payable as a rental upon the use of the building and equipment, and funds for maintenance and incidental costs of operation). The levying authority for the school district, as defined in Section 37-57-1, upon receipt of a certified copy of an order adopted by the school board of the school district in the county requesting same, shall at the same time and in the same manner as other ad valorem taxes are levied, levy an annual tax in the amount fixed in such order as may be required to meet any monetary obligation incurred under such contract. Notwithstanding any statute to the contrary, such number of mills as is necessary to defray any such contractual obligation shall be levied. However, this provision shall in no way be construed to increase the number of mills now reimbursable under the homestead exemption laws of the State of Mississippi.

(3) Before levying any taxes under the provisions of this section, which levy would exceed the limitations otherwise provided upon the number of mills which may be levied for school purposes, the board of supervisors shall adopt a resolution declaring its intention so to do, stating the amount of millage to be levied and the purpose for which the proceeds are to be used, and the date upon which said board of supervisors proposes to make such levy. Such resolution shall be published once a week for not less than three consecutive weeks, in at least one newspaper published in the county. The first publication of such resolution shall be made not less than twenty-one days prior to the date fixed in such resolution for the levying of taxes, and the last publication shall be made not more than seven days prior to such date. If within fifteen days after the final publication of said resolution, a petition signed by at least twenty percent of the qualified electors of said county, requesting an election on the proposition of levying such additional taxes for school purposes is filed with the clerk of the board of supervisors, such levy shall not be made until an election shall be held to determine whether or not a majority of qualified electors of said county shall favor the additional levy for school purposes. If a majority of the qualified electors of said county voting in such election approves the levying of the additional taxes, then the levy shall be made within the manner, form and time as required by law. If no such petition if filed with the clerk of the board of supervisors, then said levy shall be made by the board of supervisors in the manner, form and time as required by law. If any election is held under the provisions of this section, said

election shall be under the supervision of the county election commission in the manner, form and time as required by law for conducting general elections in this state.

SOURCES: Codes, 1942, § 6328-74; Laws, 1956, ch. 266, § 4; 1960, ch. 301, § 3; 1968, ch. 386, eff from and after passage (approved June 24, 1968).

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(3) Before levying any taxes under the provisions of this section, which levy would exceed the limitations otherwise provided for school purposes, the levying authority for the school district, as defined in Section 37-57-1, shall adopt a resolution declaring its intention so to do, stating the amount of millage to be levied and the purpose for which the proceeds are to be used, and the date upon which it proposes to make such levy. Such resolution shall be published once a week for not less than three (3) consecutive weeks, in at least one (1) newspaper having general circulation in the school district. The first publication of such resolution shall be made not less than twenty-one (21) days prior to the date fixed in such resolution for the levying of taxes, and the last publication shall be made not more than seven (7) days prior to such date. If within fifteen (15) days after the final publication of said resolution, a petition signed by the lesser of fifteen hundred (1500) or twenty percent (20%) of the qualified electors of said school district, requesting an election on the proposition of levying such additional taxes for school purposes is filed with the clerk of the board of supervisors or the clerk of the municipality, as the case may be, such levy shall not be made until an election shall be held to determine whether or not three-fifths (3/5) of qualified electors of said school district shall favor the additional levy for school purposes. If three-fifths (3/5) of the qualified electors of said school district voting in such election approves the levying of the

additional taxes, then the levy shall be made within the manner, form and time as required by law. If no such petition is filed with the clerk as herein provided, then said levy shall be made by the levying authority in the manner, form and time as required by law. If any election is held under the provisions of this section, said election shall be under the supervision of the county or municipal election commission, as the case may be, in the manner, form and time as required by law for conducting general elections in this state.

SECTION 47. Sections 37-7-601, 37-7-603, 37-7-605, 37-7-607, 37-7-609, 37-7-611, 37-7-613, 37-7-615, 37-7-617, 37-7-619, 37-7-621, 37-7-623, 37-7-625, 37-7-627, 37-7-629, 37-7-631, 37-7-633, 37-7-635, 37-7-637, 37-7-639, 37-7-641, 37-7-643 and 37-7-645, Mississippi Code of 1972, which provide for the creation and operation of municipal separate school districts, are hereby repealed.

§37-7-103. Abolition, alteration or creation of districts by county board of education.

After school districts have been reconstituted and created in the manner prescribed by Article 1 of this chapter, the county board of education shall have full jurisdiction, power, and authority, at any regular meeting thereof or at any special meeting called for that purpose, to abolish any existing district other than a municipal separate school district, to change or alter the boundaries of any such district, to create any new districts, and to otherwise create, alter, or abolish any of the school districts of such county, other than the municipal separate school districts. In addition thereto, with the consent of the board of trustees of the municipal separate school district involved, the county board of education may add to such municipal separate school districts any part of the county adjoining same, and with the consent of the board of trustees of the municipal separate school district involved, the county board may detach territory from such municipal separate school district and annex same to an adjoining district in the county school system.

SOURCES: Codes, 1942, § 6274-06; Laws, 1953, Ex Sess, ch. 16, § 6, eff from and after July 1, 1954.

SECTION 52. Section 37-7-103, Mississippi Code of 1972, is amended as follows:

37-7-103. From and after July 1, 1987, the school board of any school district shall have full jurisdiction, power and authority, at any regular meeting thereof or at any special meeting called for that purpose, to abolish such existing district, or to reorganize, change or alter the

boundaries of any such district. ⌐ In addition thereto, with the consent of the school board ⌐ of the ⌐ school district involved, the school board ⌐ may add to such ⌐ school district ⌐ any part of the school district adjoining same, and with the consent of the school board ⌐ of the ⌐ school district involved, ⌐ may detach territory from such school district and annex same to an adjoining district. ⌐

§37-7-105. Procedure to abolish, alter or create a district in absence of petition filed by electorate.

In cases where the county board of education abolishes, alters, or creates a school district without a petition therefor as is otherwise provided in sections 37-7-107, 37-7-109, the county board of education shall publish the order creating, altering, or abolishing such district or districts in some newspaper published and having a general circulation in such county once each week for three consecutive weeks, which said order shall be duly certified by the president of said county board of education. If no newspaper be published in said county, then such order shall be published for the required time in some newspaper having a general circulation therein, and, in addition, a copy of said order shall be posted for the required time at three public places in the county. The order so published shall contain a provision giving notice that said order shall become final thirty days after the first publication of said notice unless a petition is filed protesting against same within such time. In the event no such petition be filed, the said order shall become final at said time. However, in the event twenty per cent of the qualified electors of any school district created, altered, or abolished by such order shall file a petition with the county board of education, within thirty days after the first publication of said notice, protesting against the creation, alteration, or abolition of such district, then an election shall be called and held, on order of the county board of education, by the county election commission, after publication of legal notice of such election, which said election shall be held within thirty days after the first publication of

the notice of such election. At such election the question shall be submitted to the qualified electors of the district or districts affected and from which a petition is filed as to whether or not such district or districts shall be created, altered, or abolished as provided in the said order of the county board of education. If a majority of those voting in said election in each district affected and from which a petition is filed shall vote in favor of the order of the county board of education then such order shall become final. If a majority of those voting in said election in any district from which a petition is filed shall vote against the order of the county board of education then such order shall be void and of no effect and no further attempt to make the proposed change in such district shall be made for a period of at least two years after the date of said election.

SOURCES: Codes, 1942, § 6274-06; Laws, 1953, Ex Sess, ch. 16, § 6, eff from and after July 1, 1954.

SECTION 53. Section 37-7-105, Mississippi Code of 1972, is amended as follows:

37-7-105. In cases where the school board ~ abolishes, alters or reorganizes a school district without a petition therefor as is otherwise provided in Sections 37-7-107 and 37-7-109, the school board ~ shall publish the order reorganizing, altering or abolishing such district or districts in some newspaper published and having a general circulation in such district(s) once each week for three (3) consecutive weeks, which said order shall be duly certified by the president of said school board. ~ If no newspaper be published in said school district, then such order shall be published for the required time in some newspaper having a

general circulation therein, and, in addition, a copy of said order shall be posted for the required time at three (3) public places in the school district. The order so published shall contain a provision giving notice that said order shall become final thirty (30) days after the first publication of said notice unless a petition is filed protesting against same within such time. In the event no such petition be filed, the said order shall become final at said time. However, in the event twenty percent (20%) of the qualified electors of any school district reorganized, altered or abolished by such order shall file a petition with the school board, within thirty (30) days after the first publication of said notice, protesting against the reorganization, alteration or abolition of such district, then an election shall be called and held, on order of the school board, by the county election commission(s), after publication of legal notice of such election, which said election shall be held within thirty (30) days after the first publication of the notice of such election. At such election the question shall be submitted to the qualified electors of the district or districts affected and f m which a petition is filed as to whether or not such district or districts shall be reorganized, altered or abolished as provided in the said order of the school board. If a majority of those voting in said election in each district affected and from which a petition is filed shall vote in favor of the order of the school board then such order shall become final. If a majority of those voting in said election in any district from which a petition is filed shall vote against the order of the school board then such order shall be void and of no effect and no further attempt to make the proposed change in such district shall be made for a period of at least two (2) years after the date of said election.

§37-7-107. Procedure to abolish district pursuant to petition filed by electorate.

If a petition signed by two-thirds of the qualified electors of an existing school district shall be filed with the county board of education requesting that such district be abolished, then the county board of education shall enter an order abolishing such school district. Such order shall become final without publication thereof upon such date as may be fixed by the county board of education but not later than the first day of July next succeeding the date of such order.

SECTION 54. Section 37-7-107, Mississippi Code of 1972, is amended as follows:

37-7-107. If a petition signed by two-thirds (2/3) of the qualified electors of an existing school district shall be filed with the school board ✓ requesting that such district be abolished, then the school board ✓ shall enter an order abolishing such school district. Such order shall become final without publication thereof upon such date as may be fixed by the school board ✓ but not later than July 1 next succeeding the date of such order.

§37-7-109. Procedure to alter district pursuant to petition filed by electorate.

If a petition signed by a majority of the qualified electors of specifically described territory of an existing school district shall be filed with the county board of education requesting that said described territory be taken from such existing district and annexed to an adjacent district, the county board of education, after consideration thereof, and with the consent and approval of the board of trustees of the district to which such territory is to be annexed, shall have the power and authority, in its discretion, to take such territory from the existing district and annex same to the adjacent district. However, before doing so, the county board of education must find and determine that the taking of the territory from the existing school district will not seriously interfere with or impair the efficiency of such school district, and all orders adopted under the provisions of this section shall be invalid unless such finding and determination be made. Any order adopted under the provisions of this section shall become final without publication thereof upon such date as may be fixed by the county board of education but not later than the first day of July next succeeding the date of such order. The taking of territory from existing school districts under the provisions of this section shall not release the property in such territory from assessment and liability for the payment of the oustanding bonds or other indebtedness of the district from which the territory is taken and it shall be the duty of the board of supervisors to continue to levy taxes on such territory in an amount sufficient to pay such territory's pro rata part of all outstanding bonds or other indebt-

edness existing at the time the territory is taken from such district. In addition thereto, the territory involved shall become liable for its pro rata part of the outstanding bonds or other indebtedness of the district to which it is annexed and taxes shall be levied thereon for the payment thereof to the same extent as taxes are levied upon the other territory of such district.

SECTION 55. Section 37-7-109, Mississippi Code of 1972, is amended as follows:

37-7-109. If a petition signed by a majority of the qualified electors of specifically described territory of an existing school district shall be filed with the school board ~ requesting that said described territory be taken from such existing district and annexed to an adjacent district, or reorganized into a new school district, the said school board, ~ after consideration thereof, and with the consent and approval of the school board ~ of the district to which such territory is to be annexed, if such be the case, shall have the power and authority, in its discretion, to take such territory from the existing district and annex same to the adjacent district, or to create a new school district of such specifically described territory. However, before doing so, the school board ~ must find and determine that the taking of the territory from the existing school district will not seriously interfere with or impair the efficiency of such school district, and all orders adopted under the provisions of this section shall be invalid unless such finding and determination be made. Any order adopted under the provisions of this section shall become final without publication thereof upon such date as may be fixed by the school board but not later than the first day of July next succeeding the date of such order. The taking of territory from existing school districts under the provisions of this section shall not release the property in

such territory from assessment and liability for the payment of the oustanding bonds or other indebtedness of the district from which the territory is taken and it shall be the duty of the board of supervisors to continue to levy taxes on such territory in an amount sufficient to pay such territory's pro rata part of all outstanding bonds or other indebtedness existing at the time the territory is taken from such district. In addition thereto, the territory involved shall become liable for its pro rata part of the outstanding bonds or other indebtedness of the district to which it is annexed and taxes shall be levied thereon for the payment thereof to the same extent as taxes are levied upon the other territory of such district.

§37-7-111. Effect of abolition on indebtedness of district; territory of district shall be annexed to another district.

When any school district is abolished under the provisions of sections 37-7-105, 37-7-107, the abolition thereof shall not impair or release the property of such school district from liability for the payment of the bonds or other indebtedness of such district and it shall be the duty of the board of supervisors of said county to levy taxes on the property of said district so abolished from year to year according to the terms of such indebtedness until same shall be fully paid. No existing school district shall be abolished unless the territory comprising such district shall be annexed to another district by the county board of education in the same order abolishing the former district.

SOURCES: Codes, 1942, § 6274-06; Laws, 1953, Ex Sess, ch. 16, § 6, eff from and after July 1, 1954.

SECTION 56. Section 37-7-111, Mississippi Code of 1972, is amended as follows:

37-7-111. When any school district is abolished or altered under the provisions of this act, the abolition or alteration thereof shall not impair or release the property of such school district from liability for the payment of the bonds or other indebtedness of such district and it shall be the duty of the board of supervisors of said county to levy taxes on the property of said district so abolished or altered from year to year according to the terms of such indebtedness until same shall be fully paid. No existing school district shall be abolished unless the territory com-

prising such district shall be annexed to another district in the same order abolishing the former district.

§37-41-95. Manner of issuance and form thereof.

All such notes issued by a county shall be signed by the president of the board of supervisors and countersigned by the clerk of the board of supervisors, and the seal of the county shall be impressed on each note as it is issued. All notes issued for a municipal separate school district or special municipal separate school district shall be signed by the mayor of the municipality and shall be countersigned by the clerk of the municipality, and the seal of the municipality shall be affixed thereto. The interest on said notes may be evidenced by proper coupons attached thereto and such coupons may bear only the facsimile signatures of the president of the board of supervisors and the clerk thereof, or the mayor of the municipality and the clerk of the municipality, as the case may be. Such notes shall be issued in such form and in such denominations as the board of supervisors or the governing authorities of the municipality shall determine. All of said notes shall be registered by the clerk of the board of supervisors or the clerk of the municipality in a book kept by him in his office for that purpose.

Where bonds are issued by the board of supervisors or the governing authorities of the municipality, as the case may be, the manner of issuance and the form thereof shall be in compliance with the provisions of sections 19-9-1 through 19-9-31, or sections 21-33-301 through 21-33-329, whichever shall be applicable.

SOURCES: Laws, 1982, ch. 354, § 26, eff from and after July 1, 1982.

SECTION 153. Section 37-41-95, Mississippi Code of 1972, is amended as follows:

37-41-95. All such notes issued by a school district shall be signed by the president of the school board ✓ and countersigned by the superintendent of schools, and the seal of the school district shall be impressed on each note as it is issued. ✓ The interest on said notes may be evidenced by proper coupons attached thereto and such coupons may bear only the facsimile signatures of the president of the school board ✓ and the superintendent of schools. Such notes shall be issued in such form and in such denominations as the school board ✓ shall determine. All of said notes shall be registered by the superintendent of schools ✓ in a book kept by him in his office for that purpose.

Where bonds are issued by the school board ✓ the manner of issuance and the form thereof shall be in compliance with the provisions of Sections 37-59-1 through 37-59-45, except that such bonds may be issued upon approval of three-fifths (3/5) of the electors voting in any election held for the purpose of issuing such bonds.

§37-57-105. Levy by board of supervisors for support of special municipal separate school district; levy to cover expenses, funds for which are not provided by minimum program fund allotments.

(1) In addition to the taxes levied under sections 37-7-739 and 37-57-3, the county board of supervisors upon receipt of a certified copy of an order adopted by the board of trustees of any special municipal separate school district requesting a tax levy for the support of the school district, and the municipal governing authorities, upon receipt of a certified copy of an order adopted by the board of trustees of any municipal separate school district requesting a tax levy for the support of the school district, shall, at the same time and in the same manner as other ad valorem taxes are levied, levy an annual ad valorem tax in the amount fixed in such order upon all of the taxable property of such school district; however, such mandatory levy, including the taxes levied under sections 37-7-739 and 37-57-3, shall not exceed the millage limitation set forth in section 37-57-107, but the county board of supervisors and the municipal governing authorities, respectively, may, in their discretion, levy an additional ad valorem tax for the support of such school districts which shall not be subject to any millage limitation, but the cumulative ad valorem taxes levied for the support of such school districts shall be subject to the ten percent (10%) increase limitation set forth in section 37-57-107. The proceeds of such tax levy shall be placed in the respective county or municipal depository to the credit of the school district and shall be expended in the manner provided by law for the purpose of supplementing teachers' salaries, ex-

tending school terms, purchasing furniture, supplies and materials, and for all other lawful operating and incidental expenses of such school district, funds for which are not provided by minimum program fund allotments.

(2) In addition to the taxes levied under section 37-57-1, the county board of supervisors, upon receipt of a certified copy of an order adopted by the board of trustees of any school district in the county school system requesting a tax levy for the support of the school district, may, at the same time and in the same manner as other ad valorem taxes are levied, levy an annual ad valorem tax in the amount fixed in such order upon all of the taxable property of such school district. The proceeds of such tax levy shall be placed in the county depository to the credit of the school district and shall be expended in the manner provided by law for the purpose of supplementing teachers' salaries, extending school terms, purchasing furniture, supplies and materials, and for all other lawful operating and incidental expenses of such school district, funds for which are not provided by minimum program fund allotments.

When the tax is levied in a county which is the home county of a line school district or upon the territory of any school district located in two (2) or more counties, the order of the county board of education or board of trustees, as the case may be, requesting the levying of such tax shall be certified to the board of supervisors of each of the counties involved, and each of the board of supervisors shall levy the tax in the manner specified herein. The taxes so levied shall be collected by the tax collector of each of the counties involved and remitted by the tax collec-

tor to the county depository of the home county to the credit of the school district involved.

SOURCES: Laws, 1983, ch. 471, § 23, eff from and after July 1, 1983.

SECTION 163. Section 37-57-105, Mississippi Code of 1972, is amended as follows:

37-57-105. In addition to the taxes levied under Section 37-57-1, the levying authority for the school district, as defined in Section 37-57-1, upon receipt of a certified copy of an order adopted by the school board of the school district ✓ requesting an ad valorem tax effort in dollars for the support of the school district, shall, at the same time and in the same manner as other ad valorem taxes are levied, levy an annual ad valorem tax in the amount fixed in such order upon all of the taxable property of such school district. In making such levy, the levying authority shall make allowance for anticipated delinquencies and costs of collection so that the net amount of money to be produced by such collection so that the net amount of money to be produced by such levy shall be equal to the amount which is requested by said school board. The proceeds of such tax levy, excluding levies for the payment of the principal of and interest on school bonds or notes, shall be placed in the school depository to the credit of the school district and shall be expended in the manner provided by law for the purpose of supplementing teachers' salaries, extending school terms, purchasing furniture, supplies and materials, and for all other lawful operating and incidental expenses of such school district, funds for which are not provided by minimum program fund allotments.

When the tax is levied ✓ upon the territory of any school district located in two (2) or more counties, the order of the school board ✓ requesting the levying of such tax shall be certified to the levying authority of each of the counties

involved, and each of the levying authorities shall levy the tax in the manner specified herein. The taxes so levied shall be collected by the tax collector of the levying authority involved and remitted by the tax collector to the school depository of the home county to the credit of the school district involved as provided above.

The aggregate receipts from ad valorem taxes levied for school district purposes pursuant to this section and Sections 37-57-1 and 37-57-3 shall be subject to the increased limitation under Section 37-57-107; however, if the ad valorem tax effort in dollars requested by the school district for the fiscal year exceeds the next preceding fiscal year's ad valorem tax effort in dollars by more than seven percent (7%) but not more than ten percent (10%), then the school board shall publish notice thereof once each week for three (3) consecutive weeks in a newspaper having general circulation in the school district involved, with the first publication thereof to be made not less than thirty (30) days prior to the May regular meeting of the school board. If at any time prior to said meeting a petition signed by not less than twenty percent (20%) or fifteen hundred (1500), whichever is less, of the qualified electors of the school district involved shall be filed with the school board requesting that an election be called on the question of exceeding the next preceding fiscal year's ad valorem tax effort in dollars by more than seven percent (7%) but not more than ten percent (10%), then the school board shall, not later than the next regular meeting, adopt a resolution calling an election to be held within such school district upon such question. The election shall be called and held, and notice thereof shall be given, in the same manner for elections upon the questions of the issuance of the bonds of school districts, and the results thereof shall be certified to the school board. The ballot shall contain the language "For the School Tax Increase Over Seven Percent (7%)" and "Against the School Tax Increase Over Seven Percent (7%)." If a majority of the qualified electors

of the school district who voted in such election shall vote in favor of the question, then the stated increase requested by the school board shall be approved. For the purposes of this paragraph, the revenue sources excluded from the increase limitation under Section 37-57-107 shall also be excluded from the limitation described herein in the same manner as they are excluded under Section 37-57-107.

§ 37-57-107. Limitation on increases of taxes levied for school district purposes; disposition of excess revenues; ceiling on ad valorem taxes for support of municipal separate district and special municipal district.

(1) Beginning with the tax levy for the 1984 fiscal year and for each fiscal year thereafter, the aggregate receipts from taxes levied for school district purposes pursuant to section 37-57-105 and sections 37-7-739, 37-57-1 and 37-57-3 shall not exceed the aggregate receipts from those sources during the next preceding fiscal year plus an increase not to exceed ten percent (10%). The additional revenue from the ad valorem tax on any newly constructed properties or any existing properties added to the tax rolls or any properties previously exempt, which were not assessed in the next preceding year may be excluded from the ten percent (10%) increase limitation set forth herein. Taxed levied for payment of principal of and interest on general obligation school bonds issued heretofore or hereafter shall be excluded from the ten percent (10%) increase limitation set forth herein. Any additional millage levied to fund any new program mandated by the legislature shall be excluded from the limitation for the first year of the levy and included within such limitation in any year thereafter.

The ten percent (10%) increase limitation prescribed in this subsection may be increased an additional amount only when the county board of supervisors or municipal governing authorities, as the case may be, has determined the need for additional revenues and has held an election on the question of raising the limitation prescribed in this subsection. The limitation may be increased only if a majority of the qualified electors

in the school district vote in the election and if a majority of those voting in the election shall vote for the proposed increase. The resolution, notice and manner of holding the election shall be as prescribed by law for the holding of elections for the issuance of bonds by the respective county board of supervisors or municipal governing authorities. Revenues collected for the fiscal year in excess of the ten percent (10%) increase limitation pursuant to an election shall be included in the tax base for the purpose of determining aggregate receipts for which the ten percent (10%) increase limitation applies for subsequent fiscal years.

Except as otherwise provided for excess revenues generated pursuant to an election, if revenues collected as the result of the taxes levied for the fiscal year pursuant to this section and sections 37-7-739, 37-51-1 and 37-57-3 exceed the increase limitation, then it shall be the mandatory duty of the board of trustees of the school district to deposit such excess receipts over and above the increase limitation into a special account and credit it to the fund for which the levy was made. It will be the further duty of such board to hold said funds and invest the same as authorized by law. Such excess funds shall be calculated in the budgets for the school districts for the purpose for which such levies were made, for the succeeding fiscal year. Taxes imposed for the succeeding year shall be reduced by the amount of excess funds available. Under no circumstances shall such excess funds be expended during the fiscal year in which such excess funds are collected.

(2) Ad valorem taxes levied by the county board of supervisors for the support of any special mu-

nicipal separate school district pursuant to section 37-57-105 and section 37-7-739, and ad valorem taxes levied by the municipal governing authorities for the support of any municipal separate school district pursuant to section 37-57-105 and section 37-57-3, shall not exceed twenty-eight (28) mills for each school district, unless otherwise provided by section 37-57-105.

SOURCES: Law, 1983, ch. 471, § 24, eff from and after July 1, 1983.

SECTION 164. Section 37-57-107, Mississippi Code of 1972, is amended as follows:

37-57-107. Beginning with the tax levy for the 1987 fiscal year and for each fiscal year thereafter, the aggregate receipts from taxes levied for school district purposes pursuant to Sections 37-57-105 and 37-57-1 shall not exceed the aggregate receipts from those sources during the next preceding fiscal year plus an increase not to exceed ten percent (10%). The additional revenue from the ad valorem tax on any newly constructed properties or any existing properties added to the tax rolls or any properties previously exempt which were not assessed in the next preceding year may be excluded from the ten percent (10%) increase limitation set forth herein. Taxes levied for payment of principal of and interest on general obligation school bonds issued heretofore or hereafter shall be excluded from the ten percent (10%) increase limitation set forth herein. Any additional millage levied to fund any new program mandated by the Legislature shall be excluded from the limitation for the first year of the levy and included within such limitation in any year thereafter. For the purposes of this subsection, the term "new program" shall include, but shall not be limited to, the Early Childhood Education Program required to commence with the 1986-1987 school year as provided by Section 37-21-7,

and any additional millage levied and the revenue generated therefrom, which is excluded from the limitation for the first year of the levy, to support the mandated Early Childhood Education Program shall be specified on the minutes of the school board and of the governing body making such tax levy.

The ten percent (10%) increase limitation prescribed in this section may be increased an additional amount only when the school board has determined the need for additional revenues and has held an election on the question of raising the limitation prescribed in this section. The limitation may be increased only if three-fifths ($^3/_5$) of those voting in the election shall vote for the proposed increase. The resolution, notice and manner of holding the election shall be as prescribed by law for the holding of elections for the issuance of bonds by the respective school boards. Revenues collected for the fiscal year in excess of the ten percent (10%) increase limitation pursuant to an election shall be included in the tax base for the purpose of determining aggregate receipts for which the ten percent (10%) increase limitation applies for subsequent fiscal years.

Except as otherwise provided for excess revenues generated pursuant to an election, if revenues collected as the result of the taxes levied for the fiscal year pursuant to this section and Sections 37-57-1 exceed the increase limitation, then it shall be the mandatory duty of the school board of the school district to deposit such excess receipts over and above the increase limitation into a special account and credit it to the fund for which the levy was made. It will be the further duty of such board to hold said funds and invest the same as authorized by law. Such excess funds shall be calculated in the budgets for the school districts for the purpose for which such levies were made, for the succeeding fiscal year. Taxes imposed for the succeeding year shall be reduced by the amount of

excess funds available. Under no circumstances shall such excess funds be expended during the fiscal year in which such excess funds are collected.

§ 37-59-11. Calling of election on issuance of bonds.

Whenever either a certified copy of a resolution adopted by the board of trustees of a school district, or a petition signed by not less than ten per centum of the qualified electors of a school district, fixing the maximum amount of such bonds and the purpose or purposes, for which they are to be issued, shall be filed with the board of supervisors of the county or the governing authorities of the municipality, as the case may be, requesting that an election be called to determine whether or not the bonds of such school district shall be issued for any of the purposes enumerated in section 37-59-3, the board of supervisors of the county or the governing authorities of the municipality, as the case may be, within sixty days after receipt thereof, shall adopt a resolution calling an election to be held within such school district for the purpose of submitting to the qualified electors thereof the question of the issuance of bonds in the amount and for the purpose or purposes as set forth in such resolution or petition. The resolution calling such election shall designate the date upon which the election shall be held and the place or places within such district at which such election shall be held, which place or places may or may not be the school house or school houses in such district.

SOURCES: Codes, 1942, § 6532-04; Laws, 1950, ch. 231, § 4, eff from and after July 1, 1950.

SECTION 170. Section 37-59-11, Mississippi Code of 1972, is amended as follows:

(Until June 30, 1987, Section 37-59-11 shall read as follows:)

37-59-11. (1) Before any money shall be borrowed under the provisions of this act, the school board of the school district shall adopt a resolution declaring the necessity for borrowing such money, declaring its intention to issue the negotiable bonds of the school district as evidence of same. The resolution shall also set forth the amount of the indebtedness to be incurred and the purpose or purposes for which the money so borrowed is to be expended, including the approximate cost of the alterations, additions and repairs to be made.

(2) The resolution so adopted by the school board shall be published once each week for three (3) consecutive weeks in at least one (1) newspaper published in the school district involved, with the first publication thereof to be made not less than twenty-one (21) days prior to the date upon which the school board is to take final action upon the question of authorizing the borrowing of said money. If no newspaper is published in such school district, then such notice shall be given by publishing the same for the required time in some newspaper having a general circulation in said school district. If no peitition requesting an election is filed prior to such meeting as is hereinafter provided, then the school board shall, at said meeting, by resolution spread upon its minutes, give final approval to the borrowing of said money and shall authorize the issuance of negotiable bonds for the school district by the board of supervisors or the governing authorities of the municipality, as the case may be.

(3) If at any time prior to said meeting a petition signed by twenty percent (20%) or fifteen hundred (1500), whichever is less, of the qualified electors of the school district involved shall be filed with the school board requesting that an election be called on the question of incurring said indebtedness, then the school board shall adopt a resolution

calling an election to be held within such school district upon the question of the incurring of said indebtedness for the purposes and in the amount requested. Such election shall be called and held, and notice thereof shall be given, as provided in Sections 37-59-13 and 37-59-15.

(From and after July 1, 1987, Section 37-59-11 shall read as follows:)

37-59-11. (1) Before any money shall be borrowed under the provisions of this act, the school board of the school district shall adopt a resolution declaring the necessity for borrowing such money, declaring its intention to borrow such money and to issue the negotiable bonds of the school district as evidence of same, specifying the amount to be so borrowed, and how such indebtedness is to be evidenced. Such resolution shall also set forth the nature and approximate cost of the alterations, additions and repairs to be made, and shall declare in said resolution that no funds are available in the school funds of the district or from any other source with which to make such repairs, alterations, additions, purchases, erections or improvements.

(2) Whenever a resolution is adopted by the school board as provided in subsection (1), or a petition signed by not less than ten percent (10%) of the qualified electors of a school district, fixing the maximum amount of such school bonds and the purpose or purposes for which they are to be issued, the school board shall adopt a resolution calling an election to be held within such school district for the purpose of submitting to the qualified electors thereof the question of the issuance of bonds in the amount and for the purpose or purposes as set forth in such resolution or petition. The resolution calling such election shall designate the date upon which the election shall be held and the place or places within such district at which such election shall be held, which place or places may or may not be the school house or school houses in such district.

§ 37-59-105. Declaration of intention by local authorities; election; issuance of indebtedness.

At its first regular meeting following the receipt of the resolution of the board of trustees of a school district, the board of supervisors or governing authorities of the municipality, as the case may be, shall declare its intention to authorize the borrowing of said money and to issue the negotiable notes or certificates of indebtedness of the school district as evidence of same. Said resolution shall also set forth the amount of the indebtedness to be incurred and the purpose or purposes for which the money so borrowed is to be expended. The said resolution so adopted shall be published once each week for two (2) consecutive weeks in a newspaper having a general circulation in the school district involved, with the first publication thereof to be made not less than fifteen (15) days prior to the date upon which the board of supervisors or governing authorities of the municipality, as the case may be, are to take final action upon the question of authorizing the borrowing of said money. If no petition requesting an election is filed prior to such meeting as is hereinafter provided, then the board of supervisors or the governing authorities of the municipality, as the case may be, shall, at said meeting, by resolution spread upon its minutes, give final approval to the borrowing of said money and shall authorize the issuance of negotiable notes or certificates of indebtedness of the school district therefor in accordance with the provisions of this article.

If at any time prior to said meeting a petition signed by not less than twenty per cent (20%) of the qualified electors of the school district in-

volved shall be filed with the board of supervisors or governing authorities of the municipality, as the case may be, requesting that an election be called on the question of incurring said indebtedness, then the board of supervisors or governing authorities of the municipality shall, not later than the next regular meeting, adopt a resolution calling an election to be held within such school district upon the question of the incurring of said indebtedness of the purposes and in the amount requested. Such election shall be called and held, and notice thereof shall be given, in the same manner provided in Article 1 of this chapter for elections upon the question of the issuance of the bonds of school districts, and the results thereof shall be certified to the board of supervisors or the governing authorities of the municipality, as the case may be. If a majority of the qualified electors of the school district shall vote in favor of incurring said indebtedness, then the board of supervisors or governing authorities of the municipality, as the case may be, shall proceed to issue said negotiable notes or certificates of indebtedness as prayed for in the original resolution of the board of trustees; however, if a majority of the qualified electors voting in said election vote against incurring said indebtedness, then said notes or certificates of indebtedness shall not be issued.

Money may be borrowed under the provisions of this article and the negotiable notes or certificates of indebtedness evidencing same may be issued as provided in this article (1) without the necessity of being authorized in an election called for that purpose, except where a petition requesting an election is filed as provided herein

and (2) without the necessity of giving notice thereof except as specifically provided herein.

SECTION 185. Section 37-59-105, Mississippi Code of 1972, is amended as follows:

37-59-105. ✓ The school board ✓ shall by resolution declare its intention to authorize the borrowing of said money and to issue the negotiable notes or certificates of indebtedness of the school district as evidence of same. Said resolution shall also set forth the amount of the indebtedness to be incurred and the purpose or purposes for which the money so borrowed is to be expended. The said resolution so adopted shall be published once each week for two (2) consecutive weeks in a newspaper having a general circulation in the school district involved, with the first publication thereof to be made not less than fifteen (15) days prior to the date upon which the school board ✓ is to take final action upon the question of authorizing the borrowing of said money. If no petition requesting an election is filed prior to such meeting, ✓ then the school board ✓ shall, at said meeting, by resolution spread upon its minutes, give final approval to the borrowing of said money and shall authorize the issuance of negotiable notes or certificates of indebtedness of the school district therefor in accordance with the provisions of this article.

If at any time prior to said meeting a petition signed by not less than twenty percent (20%) of the qualified electors of the school district involved shall be filed with the school board ✓ requesting that an election be called on the question of incurring said indebtedness, then the school board ✓ shall, not later than the next regular meeting, adopt a resolution calling an election to be held within such school district upon the question of the incurring of said indebtedness for the purposes and in the amount requested. Such election shall be called and held, and notice thereof shall be given, in the same manner provided in

Article 1 of this chapter for elections upon the question of the issuance of the bonds of school districts, and the results thereof shall be certified to the school board. ~ If three-fifths (3/5) of the qualified electors voting in said election shall vote in favor of incurring said indebtedness, then the school board ~ shall proceed to issue said negotiable notes or certificates of indebtedness as prayed for in the original resolution of the school board; ~ however, if less than three-fifths (3/5) of the qualified electors voting in said election vote in favor of incurring said indebtedness, then said notes or certificates of indebtedness shall not be issued.

Money may be borrowed under the provisions of this article and the negotiable notes or certificates of indebtedness evidencing same may be issued as provided in this article (1) without the necessity of being authorized in an election called for that purpose, except where a petition requesting an election is filed as provided herein and (2) without the necessity of giving notice thereof except as specifically provided herein.

SECTION 203. The qualified electors of any county having an elected county superintendent of education on July 1, 1986, shall decide at the November 1988 general election whether (a) to continue to have such office elected, or (b) to abolish such office of county superintendent of education in the county. The county board of supervisors of such counties shall publish notice of said election once a week for at least three (3) consecutive weeks prior to the November 1988 general election in at least one (1) newspaper published or circulated in such county. The proposition shall be submitted to a vote of all qualified electors residing outside the territory of any municipal separate or special municipal separate school district located within such county. Such election shall be held in the same manner as other elections are held in the county. If a majority of the qualified electors who voted in such election vote in favor of the abolition of such office, such abolishment shall be effective at the end of any regular term of office or whenever a vacancy shall occur in said office. In counties where the office of elected county superintendent of education has been abolished, it shall not be reinstated.

APPENDIX L

MISS. CODE ANN. § 37-7-611

§ 37-7-611. Merging of adjacent school districts.

Where the corporate limits of any municipality which constitutes a municipal separate school district, either with or without added territory, are extended so as to include the whole or any part of an existing adjacent school district in the county school system or municipal separate district, then such adjacent school district, or such part thereof as is included within the corporate limits of the municipality by reason of the extension thereof, shall thereby automatically be merged with and become a part of such municipal separate school district. However, when any such extension, that is, an extension taking in a part of or all of an adjacent school district, becomes effective subsequent to September 1 of any fiscal year of said school district, that portion of the existing adjacent school district which is included because of the extension of the corporate limits of such municipality shall become annexed to the municipal separate school district immediately but shall remain under the jurisdiction of said adjacent school district for the remainder of such fiscal year for school purposes only, and it shall be the duty of such existing adjacent school district to continue to provide for the education and transportation for the balance of such fiscal year of the pupils residing in that portion of said existing adjacent school district included within the municipal separate school district by virtue of such extension at the expense of the existing adjacent school district, all just as though the extension of the municipal boundaries had not become effective until the last day of the fiscal year of the school districts involved; when the school building or buildings of any such adjacent school district in the county school system shall be included within the corporate limits of the municipality by reason of any such extension of such corporate limits then the whole of such adjacent school

district shall automatically be added to and become a part of such municipal separate school district as added territory.

When the corporate limits of any municipality shall be extended but the school building or buildings of an existing adjacent school district are not included therein, then, on petition of a majority of the qualified electors residing in that portion of such existing adjacent district which is not included within the corporate limits of the municipality filed with the governing authorities of the municipality, that part of such adjacent district not included within the corporate limits of the municipality shall be added to the municipal separate school district as added territory and shall be operated thereafter as a part of the municipal school district system. However, when the corporate limits of a municipality are extended so as to include within the corporate limits one or more school buildings being used as attendance centers of an adjacent school district having more than one attendance center, but all of the school buildings of such district are not so included within the corporate limits, then, in addition to that portion of the adjacent school district included within the corporate limits as extended, which shall be automatic as hereinabove set forth, there shall become a part of such municipal separate school district as added territory that area or areas designated by agreement between the trustees of the municipal separate school district and the trustees of the adjacent school district which, before becoming effective, must be approved by the state educational finance commission, the effective date thereof to be designated by proper order of the educational finance commission. In the event no agreement has been reached between the trustees of the respective school districts and filed with the educational finance commission within ninety days from the effective date of the expansion of the municipal limits, then the educational finance commission, on its own motion or on motion of either of the school districts involved, shall by

order spread upon its minutes, designate such area outside the municipal limits, as extended, as shall be included in the municipal separate school district as added territory, together with the effective date thereof. Either school district involved shall have the right to appeal from the decision of the educational finance commission in the manner provided by sections 37-45-51 and 37-45-61.

SOURCES: Codes, 1942, § 6411-06; Laws, 1953, Ex. Sess., ch. 23, § 6; 1959 Ex. Sess., ch. 29, § 1.

APPENDIX M

[SEAL] **U.S. Department of Justice**

WBR:SSC:MSB:gmh
DJ 166-012-3
P9110
P9535-9549

Washington, D.C. 20530

August 29, 1986

Honorable Edwin Lloyd Pittman
Attorney General
P. O. Box 220
Jackson, Mississippi 39205-0220

Dear Mr. Attorney General:

This refers to Chapter 492, S.B. No. 2117 (1986), which amends various provisions of the code affecting public schools in the State of Mississippi, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on July 23, 1986. In accordance with your request, expedited consideration has been given this submission pursuant to the Procedures for the Administration of Section 5 (28 C.F.R. 51.32).

The Attorney General does not interpose any objection to the voting changes occasioned by Senate Bill No. 2117 (1986), as identified in your July 22, 1986, letter. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such change. In addition, as authorized by Section 5, the Attorney General reserves the right to reexamine this submission if additional information that would otherwise require an objection comes to his attention during the remainder of the sixty-day review period. See also 28 C.F.R. 51.42 and 51.48.

We note that several of the provisions of Senate Bill No. 2117 (1986) authorize officials of the political subdivisions of the State to make changes affecting voting which are viewed as enabling legislation. Therefore, local officials are not relieved of their responsibility to seek preclearance, pursuant to the requirements of Section 5, of any changes affecting voting (*e.g.*, changing voting precinct lines, polling places, special election dates and procedures, boundary changes, etc.) which are adopted as a result of the provisions of Senate Bill No. 2117. 28 C.F.R. 51.14.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

By: /s/ Sandra Coleman
for Gerald W. Jones
Chief, Voting Section

APPENDIX N

STATE OF MISSISSIPPI
[SEAL]
OFFICE OF THE ATTORNEY GENERAL
TELEFAX NUMBER (601) 359-3796

CARROLL GARTIN JUSTICE BUILDING
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220

TELEPHONE (601) 359-3680

EDWIN LLOYD PITTMAN
ATTORNEY GENERAL

STEPHEN J. KIRCHMAYR
Deputy Attorney General

SIDNEY J. MARTIN
Deputy Attorney General

December 30, 1987

Honorable Gerald W. Jones
Chief, Voting Section
Civil Rights Division
Voting Section
P. O. Box 66128
Washington, D.C. 20035-6128

Re: SUBMISSION OF CHAPTER 492, SECTION 47; [MISS. CODE ANN. 37-7-611 (1972)] OF THE 1986 LAWS OF MISSISSIPPI

Dear Mr. Jones:

Please find enclosed herein the above referenced legislation submitted pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973(c) to the Attorney General of the United States.

Expedited consideration of this submission will be greatly appreciated.

Very truly yours,

/s/ Edward Lloyd Pittman
Edwin Lloyd Pittman
Attorney General

Enclosure

ELP/JE/vh

SUBMISSION UNDER SECTION 5 OF THE VOTING RIGHTS ACT OF 1965 AS AMENDED, 42 U.S.C. § 1973(c)

TO: The Attorney General of the
United States of America
The Honorable Edwin Meese, III

SUBMISSION OF CHAPTER 492, SECTION 47; [MISS. CODE ANN. 37-7-611 (1972)] OF THE 1986 LAWS OF MISSISSIPPI

EXPEDITED CONSIDERATION REQUESTED

Pursuant to Section 5 of the Voting Rights Act of 1965, as amended and extended, 42 U.S.C. § 1973(c) [hereinafter referred to as Section 5] and the U.S. Department of Justice's Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as amended, 28 C.F.R. §§ 51.1 *et seq.* (1987), the State of Mississippi, by and through the Attorney General of the State of Mississippi, Edwin Lloyd Pittman, respectfully submits to the Attorney General of the United States Chapter 492, Section 47; [Miss. Code Ann. §37-7-611 (1972)] of the 1986 Laws of the State of Mississippi currently codified at Miss. Code Ann. § 37-7-611 (1972) [hereinafter sometimes referred to as Chapter 611 and/or instant submission]. In making this submission the State of Mississippi hereby expressly reserves and does not waive any and all objections it may have concerning whether the instant submission is subject to the preclearance requirements of Section 5. For this submission, the State of Mississippi respectfully states as follows:

28 C.F.R. § 51.27(a).

A copy of Chapter 492, Section 47; [Miss. Code Ann. §37-7-611 (1972)] as approved on April 15, 1986, is attached hereto as Appendix A. (See Chapter 492 attached hereto as Appendix A-1).

28 C.F.R. § 51.27(b).

Chapter 492, Section 47 of 1986 repeals a series of Code sections dealing with the creation, abolition and administration of school districts. The instant submission concerns the repeal of Miss. Code Ann. §37-7-611 (1972). Accordingly, §37-7-611 is attached hereto as Appendix B and Appendix B-1. Miss. Code Ann. §37-7-611 (1972) is the codification of Chapter 29 of the 1959 (Extraordinary Session) Laws of Mississippi, and is attached hereto as Appendix C.

28 C.F.R. § 51.27 (c).

Chapter 492 of the 1986 Laws of Mississippi is known and cited as the "Mississippi Uniform School Law of 1986." It is a comprehensive and detailed enactment dealing with the whole range of issues facing education. In order to congregate all laws of the instant subject matter into one uniform act, other piecemeal legislation had to be repealed. The major part of Chapter 492, as it deals with the Voting Rights Act of 1965, as amended and extended, 42 U.S.C. §1973 (c), has already been precleared by the United States Justice Department on August 29, 1986.

The subject of the instant submission is Miss. Code Ann. §37-7-611 (1972) which is the codification of Chapter 29 of the 1959 (Extraordinary Session) Laws of Mississippi. Chapter 29 provided for the merging of adjacent school districts.

> "Where the corporate limits of any municipality which constitutes a municipal separate school district, either with or without added territory, are extended so as to include the whole or any part of an existing adjacent school district in the county school system or municipal separate district, then such adjacent school district, or such part thereof as is included within the corporate limits of the municipality by reason of the ex-

> tension thereof, shall thereby automatically be merged with and become a part of such municipal separate school district."

Chapter 29 further provided that when the corporate limits of any municipality shall be extended but the school building or buildings of an existing adjacent school district are not included therein, then on petition of a majority of the qualified electors residing in that portion of such existing adjacent district which is not included within the corporate limits of the municipality filed with the governing authorities of the municipality that part of such adjacent district not included within the corporate limits of the municipality shall be added to the municipal separate school district as added territory and shall be operated thereafter as a part of the municipal school district system.

28 C.F.R. § 51.27 (d).

The person making this submission is Edwin Lloyd Pittman, the Attorney General of and the Chief Legal Officer for the State of Mississippi, whose address is Post Office Box 220, Jackson, Mississippi, 39205, and whose telephone number is (601) 359-3680.

28 C.F.R. § 51.27 (e).

The name of the submitting authority and the jurisdiction responsible for the change is the State of Mississippi.

28 C.F.R. § 51.27 (f).

Not applicable.

28 C.F.R. § 51.27 (g).

The Legislature of the State of Mississippi was responsible for enacting the chapter law herein submitted by legislative act.

28 C.F.R. § 51.27 (h).

The legislative power of the State of Mississippi is vested in a legislature which shall consist of a senate and a house

of representatives as set forth by Article 4, Section 33 of the Mississippi Constitution. Article 4, Section 59 of the Mississippi Constitution provides that bills may originate in either house and Article 4, Section 62 allows that no amendment to bills by one house shall be concurred in by the other except by a vote of the majority thereof. Article 4, Section 71 denotes that every bill introduced into the legislature shall have a title which clearly indicates the subject matter or matters of the proposed legislation. Further, Article 4, Section 72, sets out that every bill which passed both houses shall be presented to the Governor for his signature; but if he does not approve such bill, he shall return it, with his objections, at which point, both houses shall reconsider such bill and upon a two-thirds ($^2/_3$) vote of each house, it shall become a law.

28 C.F.R. § 51.27 (i).

Chapter 492, Section 47 was adopted effective April 15, 1986.

28 C.F.R. § 51.27 (j).

Section 47 of Chapter 492 took effect and was in force from and after July 1, 1987.

28 C.F.R. § 51.27 (k).

The Attorney General of Mississippi cannot state that the instant submission has not yet been enforced or administered because such instant submission has been enforced and administered.

28 C.F.R. § 51.27 (l).

The instant submission affects each separate school district in the entire State of Mississippi.

28 C.F.R. § 51.27 (m).

The obvious reason for this change is to void any piecemeal legislation dealing with the subject addressed in the uniform school law. Any indirect changes in the electoral

procedure or process repealed by Section 47 are contained as new legislation in the other sections of Chapter 492, most of which have already been precleared by the United States Justice Department. Section 47 is simply a house cleaning measure for Chapter 492.

It is the automatic expansion of the school district which had been repealed by the instant submission. The option to expand however, is not forclosed. Section 52, of the Chapter 492 of the 1986 Laws of Mississippi (precleared by the United States Justice Department on August 29, 1986) provides that the school board of any school district may abolish such existing district or reorganize, change or alter the boundaries of any such school district.

28 C.F.R. § 51.27 (n).

The instant submission does not and will not adversely affect racial or language minority groups. The instant submission does not affect language minority groups as such. The instant submission does *not* have the purpose, and it does *not* have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.

28 C.F.R. § 51.27 (o).

Presently there is pending in the Jackson Division of the United States District Court for the Southern District of Mississippi, a civil action which challenges the current codification of Chapter 492 because such chapter had not been precleared under Section 5 of the Voting Rights Act of 1965, *Kirksey, et al v. Pittman, et al*, Civil Action No. J86-0558(B) (S. D. Miss. filed August 12, 1986). However, since the filing of the suit substantive parts of 492 have been precleared by the Justice Department on August 29, 1986. The attorney for the plaintiffs in that litigation is:

Carroll Rhodes, Esquire
P.O. Box 588

Hazelhurst, Mississippi 39083
(601) 894-4323

28 C.F.R. § 51.27(p).

"The Mississippi Uniform School Law of 1986" completely revamps and preempts any legislation of the general subject matter. Chapter 492 has been precleared on August 29, 1986. There is no direct correlation among any repealed statues and any section of Chapter 492. Therefore, a statement that the prior practice has been precleared or is not subject to the preclearance requirement cannot be made.

28 C.F.R. § 51.27 (q).

Not applicable.

28 C.F.R. § 51.27 (r).

This submission does not concern a redistricting, annexation, or other complex change.

28 C.F.R. § 51.28(a) Demographic Information.

(1) Not applicable.

(2) Mississippi Municipalities and Counties in Mississippi, apparently do not maintain records which identify registered voters by race and language group.

(3) No estimates of population by race and language group were made in connection with the adoption of the chapter law herein being submitted.

(b) Maps.

(1)-(6) All of these sections are irrelevant to this submission because this submission does *not* revise the constituency that votes, nor does this submission affect prior or new boundaries of voting units, the prior or new boundaries of voter precincts, the location of racial and language minority groups, the location of prior new polling places or the location of prior and new voter registration sites.

(c) Annexations.

Not applicable.

(d) Election Returns.

Not applicable.

(e) Language Usage.

The submitted chapter law does not affect the use of language in the electoral process.

(f) Publicity and Participation.

The submitted chapter law does not involve a controversial or potentially controversial matter.

(1) No newspaper articles are attached.

(2) There are apparently no available public notices concerning the adoption of the submitted chapter law.

(3) The entries in the journals of the Mississippi Senate and the Mississippi House of Representatives concerning the adoption of the submitted chapter laws are attached as Appendix D.

(4) There are no statements concerning the proposed change.

(5) There are no comments from the general public.

(6) See (3) above.

(g) Availability of the Submission.

Not applicable.

(h) Minority Group Contacts.

The following black adult citizens of Mississippi can be expected to be familiar with the instant submission or have been active in the political process:

The Honorable Reuben V. Anderson
Associate Justice
Supreme Court of Mississippi
P.O. Box 117
Jackson, Mississippi 39205
(601) 359-3697

The Honorable Fred L. Banks, Jr.
Circuit Judge
Seventh Circuit Court District
P.O. Box 327
Jackson, Mississippi 39205
(601) 968-6659

The Honorable George S. Smith
President, Board of Supervisors of Hinds County
P.O. Box 205
Terry, Mississippi 39170
(601) 968-6695

Pursuant to 28 C.F.R. § 51.34, the State of Mississippi respectfully requests that this submission be given *expedited consideration* due to the fact it is involved in pending litigation.

If the Attorney General of the United States needs any further information concerning this submission, the State of Mississippi will attempt to supply it.

This, the 30th day of December, 1987.

Respectfully submitted,

STATE OF MISSISSIPPI

BY: /s/ Edwin Lloyd Pittman
EDWIN LLOYD PITTMAN
ATTORNEY GENERAL
STATE OF MISSISSIPPI

Attorney and Chief Legal Officer
for the State of Mississippi

John H. Emfinger
Special Assistant Attorney General
Post Office Box 220
Jackson, Mississippi 39205
(601) 359-3680

APPENDIX O

[SEAL] **U.S. Department of Justice**

WBR:MAP:JAR:gmh
DJ 166-012-3
T0966
T3369

Washington, D.C. 20530

FEB 28 1988

Honorable Mike Moore
Attorney General
P. O. Box 220
Jackson, Mississippi 39205-0220

Dear Mr. Attorney General:

This refers to Section 47 of Chapter 492 (1986), insofar as it repeals Miss. Code §37-7-611 concerning the extension of municipal separate school district boundaries in the State of Mississippi, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on December 31, 1987. Although we noted your request for expedited consideration, we have been unable to respond until now.

Our analysis indicates that the information sent is insufficient to enable us to determine that the proposed change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. Therefore, please provide the following information:

1. A detailed description of the process that resulted in the repeal of §37-7-611. In that regard, we understand that a committee appointed by the State Auditor prepared draft legislation which was the basis for Chapter 492, and that the committee's proposal did not provide for the repeal of §37-7-611. Identify the specific manner in which the repealer was incorporated into Chapter 492 and, if it

was added by an amendment, provide a breakdown of votes, by member, for that amendment. Identify the legislators who were the principal proponents of the repeal and provide daytime telephone numbers at which they may be contacted. Provide copies of any legislative analyses of the meaning and effect of the repealer and all newspaper articles, editorials, and letters to the editor concerning the repeal of §37-7-611.

2. A detailed explanation of the reasons for the repeal of §37-7-611, and identify the sources of your information as to the reasons for the repeal. Indicate whether the repeal was related to any particular pending or planned annexations by municipalities which have municipal separate school districts. We note that you have indicated that the reason for repealing §37-7-611 was that it was "piecemeal legislation" concerning the method by which school district boundaries may be altered. However, it has been alleged that there are special circumstances which justify the provision in §37-7-611 that when a municipality with a municipal separate school district annexes territory located in an adjacent school district the boundaries of the municipal school district also are automatically extended into the adjacent district. One such special circumstance may be that the persons annexed into the municipality thereby become eligible to vote for the municipal governing body which in turn appoints the members of the municipal school district's board of trustees. Indicate the extent to which this circumstance was considered in determining that §37-7-611 should be repealed. It also would be helpful if you would provide information as to the legislative history of §37-7-611 and the reasons for its adoption.

3. Identify the minority legislators or minority citizens who specifically were consulted regarding the inclusion of this repealer in Chapter 492 and summarize the comments they provided. If no minority legislators or citizens were consulted, explain the reasons for this omission.

4. It has been alleged that annexations by municipalities which have municipal separate school districts generally are of predominantly white residential areas, and that the repeal of §37-7-611's automatic boundary extension provision will permit municipal annexation of these areas and, at the same time, allow those whites to remain in predominantly white school districts that adjoin predominantly black municipal school districts. Please provide us with whatever information the state has which may be enlightening on this issue. In particular, include information on the population, by race, of all residential areas annexed during the last five years to municipalities with separate school districts and the population, by race, of any annexations proposed by "municipal school district" cities which currently are pending in a chancery court or other proceeding (if an annexation or proposed annexation includes an area that was part of the "added territory" of the municipal school district, provide the requested population data separately for the annexed "added territory" and the annexed area that was not in the municipal school district). Include the student population, by race, of each municipal separate school district in the state and each county, consolidated, and consolidated line school district that adjoins a municipal school district.

The Attorney General has sixty days in which to consider a complete submission pursuant to Section 5. This sixty-day review period will begin when this Department receives the information necessary for the proper evaluation of the change you have submitted. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.37(a)). Further, you should be aware that if no response is received within sixty days of this request, the Attorney General may object to the proposed change consistent with the burden of proof placed upon the submitting authority. See also 28 C.F.R. 51.40. Therefore, please inform us of the course of action the State of Mississippi plans to take to comply with this request.

In addition, it has come to our attention that a 1977 state act that modifies the procedures for extending municipal school district boundaries has not received the requisite Section 5 clearance. Our records fail to show that Chapter 379 (1977) has been submitted to the United States District Court for the District of Columbia for judicial review or to the Attorney General for administrative review as required by Section 5. As you know, changes in procedure which affect voting are unenforceable unless and until the Section 5 preclearance requirements have been met. See 28 C.F.R. 51.10.

Finally, our review of Section 47 of Chapter 492 suggests that the repeal of code sections other than §37-7-611 occasioned voting changes which have not been submitted for Section 5 review. For example, it repealed §§37-7-605, 37-7-607, and 37-7-609 which established procedures for creating and abolishing municipal separate school districts, and deannexing "added territory" from such districts. Related to the repeal of these code sections was an amendment to §37-7-113 (Section 56 of Chapter 492) which altered the procedures by which school boards may reorganize, abolish, or alter their school districts which our records also show has not been submitted for Section 5 review.

If you have any questions concerning the matters discussed in this letter of if we can aid you in any way to obtain the additional information we have requested, feel free to call Ms. Julie Riley (202-272-6295) of our staff. In addition, to enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us of the course of action the State of Mississippi plans to take with respect to Chapter 379 (1977) and the other matters discussed in the preceding paragraph. Refer to File Nos. T0966 and T3369 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

By: /s/ Gerald W. Jones
Gerald W. Jones
Chief, Voting Section

APPENDIX P

STATE OF MISSISSIPPI
[SEAL]
OFFICE OF THE ATTORNEY GENERAL

JIM WARREN
Special Assistant to
the Attorney General

FRANK SPENCER
Assistant Attorney General
Director, Public Advocacy

BEVERLEY D. COLEMAN, CPA
Director, Administration

MIKE MOORE
ATTORNEY
GENERAL

STEPHEN J. KIRCHMAYR
Deputy Attorney General
Litigation

ROBERT L. GIBBS
Deputy Attorney General
State/Local Government,
Opinions

January 27, 1989

Honorable Gerald W. Jones
Chief, Voting Section
Civil Rights Division
P. O. Box 66128
Washington, D.C. 20035-6128

Re: Supplemental Information Requested
Chapter 492, § 47 (1986)
Your File Nos. T0966 and T3369

Dear Mr. Jones:

On July 22, 1986, the State of Mississippi submitted Chapter 492 Laws of 1986 for preclearance under Section 5 of the Voting Rights Act of 1965, as amended and extended (42 U.S.C. § 1973(c)). On August 29, 1986, Chapter 492 was precleared under Section 5 as to the particular sections identified in our July 22, 1986 submission.

On December 30, 1987, the State of Mississippi submitted Section 47 of Chapter 492 since Section 47 was not specifically identified in our original submission. On March 2, 1988, we received your letter dated February 29, 1988 requesting additional information to be considered in connection with your review of Section 47. In response to

these requests, the following information is submitted, to-wit:

Request No. 1.

1. A detailed description of the process that resulted in the repeal of §37-7-611. In that regard, we understand that a committee appointed by the State Auditor prepared draft legislation which was the basis for Chapter 492, and that the committee's proposal did not provide for the repeal of § 37-7-611. Identify the specific manner in which the repealer was incorporated into Chapter 492 and, if it was added by an amendment, provide a breakdown of votes, by member, for that amendment. Identify the legislators who were the principal proponents of the repeal and provide daytime telephone numbers at which they may be contacted. Provide copies of any legislative analyses of the meaning and effect of the repealer and all newspaper articles, editorials, and letters to the editor concerning the repeal of §37-7-611.

Response to Request No. 1.

As stated in our submission of Section 47, the obvious reason for this repealer provision is to void any piecemeal legislation dealing with the subject addressed in the uniform school law. Section 47 is simply a house cleaning measure for Chapter 492, most of which has already been precleared by the United States Justice Department. It is error to view the inclusion of the repeal of Section 37-7-611 as an isolated legislative act.

The repeal of Section 37-7-611 and the numerous other code provisions repealed by Section 47 of Chapter 492 were incorporated into the original senate draft of the uniform school law. It was not added by way of amendment. On information from Mr. Robert Davidson, Staff Attorney for the Senate Interim Committee to Study Public School Finance and Administration, who was also a member of the State Auditor's Advisory Committee, the

repeal of Section 37-6-611 was incorporated into the draft of the legislation submitted to the Senate Committee by the Advisory Committee appointed by the state auditor. Attached hereto as Appendix A are various memoranda establishing the Auditor's Committee, listing its members, and outlining its efforts.

Chapter 492, as declared by Section 1 thereof, is known as the "Mississippi Uniform School Law of 1986. The purpose of this legislation is aptly stated in Section 2 of the act, to-wit: "From and after July 1, 1987, all school districts in the State of Mississippi shall have the same prerogatives, powers, duties, and privileges as provided in this act."

In order to accomplish uniformity in the powers, duties and privileges in all school districts, it was necessary to repeal numerous sections of the old education law that were inconsistent with the purpose and provisons of Chapter 492. Accordingly, Sections 44 through 51 of Chapter 492 repealed a total of seventy-two (72) provisions of the old education law. Section 44 repealed eleven (11) sections which prescribed the powers and duties of county boards of education. Section 45 repealed three (3) sections which provided for the organization of boards of trustees of municipal separate and consolidated school districts. Section 46 repealed two (2) sections which provided for the expenditure of school district funds for incidentals and further provided for contracts for attendance and transportation of pupils by municipal separate school districts. Section 47 repealed twenty-three (23) sections which provided for the creation and operation of municipal separate school districts, one of which was Section 37-7-611. Section 48 repealed twelve (12) sections which provided for the operation of special municipal separate school districts. Section 49 repealed six (6) sections which provided for the creation and operation of line consolidated school districts. Finally, Section 51 repealed nine sections which mandated and provided for a reorganization of school dis-

tricts in 1957. The specific code sections repealed by Sections 44 through 51 of Chapter 492 are as follows:

37-5-21	37-7-313	37-7-629	37-7-733	37-7-903
37-5-23	37-7-601	37-7-631	37-7-735	37-7-905
37-5-25	37-7-603	37-7-633	37-7-737	37-7-907
37-5-27	37-7-605	37-7-635	37-7-739	37-7-909
37-5-29	37-7-607	37-7-637	37-7-741	37-7-911
37-5-31	37-7-609	37-7-639	37-7-743	37-7-1
37-5-33	37-7-611	37-7-641	37-7-745	37-7-3
37-5-35	37-7-613	37-7-643	37-7-801	37-7-5
37-5-37	37-7-615	37-7-645	37-7-803	37-7-7
37-5-39	37-7-617	37-7-719	37-7-805	37-7-9
37-5-41	37-7-619	37-7-721	37-7-807	37-7-11
37-7-231	37-7-621	37-7-727	37-7-809	37-7-13
37-7-233	37-7-623	37-7-729	37-7-811	37-7-15
37-7-235	37-7-625	37-7-731	37-7-901	37-7-17
37-7-309	37-7-627			

As previously stated, the repeal of Section 37-7-611 cannot properly be viewed as an isolated legislative act as your several requests suggest. It was repealed together with a host of other laws for the purpose of placing all school districts on an equal footing, so that after July 1, 1987 all school districts in the state would have the same prerogatives powers, duties and privileges as mandated by Section 2 of Chapter 492. In this context, it should be noted that the sponsors of Chapter 492 sponsored the bill in its entirety and cannot be singled out as "principal proponents of the repeal of Section 37-7-611." The sponsors of Chapter 492 were as follows: Senators Jack Gordon, Irb Benjamin, Rob Smith, Alan Heflin and Cy Rosenblatt. The Mississippi Legislature is currently in session and these senators can be reached during the day at (601) 359-3770. The members of the Mississippi House of Representatives Education Committee who were instrumental in the passage of the Uniform School Act were as follows: "Representatives Robert Clark, Rick Fortenberry, Horace Buckley, Billy McCoy, Thomas Walman, and Jerry

Wilkerson. These representatives can also be reached at the above phone number.

Request No. 2.

A detailed explanation of the reasons for the repeal of §37-7-611, and identify the sources of your information as to the reasons for the repeal. Indicate whether the repeal was related to any particular pending or planned annexations by municipalities which have municipal separate school districts. We note that you have indicated that the reason for repealing §37-7-611 was that it was "piecemeal legislation" concerning the method by which school district boundaries may be altered. However, it has been alleged that there are special circumstances which justify the provision in §37-7-611 that when a municipality with a municipal separate school district annexes territory located in an adjacent school district the boundaries of the municipal school district also are automatically extended into the adjacent district. Once such special circumstance may be that the persons annexed into the municipality thereby become eligible to vote for the municipal governing body which in turn appoints the members of the municipal school district's board of trustees. Indicate the extent to which this circumstance was considered in determining that §37-7-611 should be repealed. It also would be helpful if you would provide information as to the legislative history of § 37-7-611 and the reasons for its adoption.

Response to Request No. 2

The Attorney General's Office has contacted legislators, legislative staff, education officials and school board attorneys[1] as to the reason for the repeal of Section 37-

[1] School officials and attorneys for Hattiesburg Public School District, Western Line Consolidated, Greenville Municipal, Harrison County, Biloxi and Gulfport schools and municipalities have filed written statements with your office expressing their views regarding the repeal of Section 37-7-611.

7-611. Other than one suggestion that the repeal of Section 37-7-611 was mistakenly incorporated into Chapter 492, the general view held is that the repeal of this section and the seventy one (71) other code sections were consistent with the legislative purpose to create uniformity among the various types of school districts by granting all districts the same prerogative powers, duties and privileges. The repeal of Section 37-7-611 was not considered eparately but rather was considered together with the repeal of all the provisions listed in response to Request No. 1 which concerned the creation and operation of the various types of school districts existing under the prior education law. The *Report of the Senate Interim Committee to Study Public School Finance and Administration in Mississippi* contains the following statement:

> "Mississippi schools currently operate under four different kinds of school districts—eight if you count the sub-categories—each with its own system of government and finance. In addition to municipal separate districts, the state now has special municipal separate, consolidated and countywide school districts. These types of districts were the result of the Special Session of the Legislature in 1953 which reduced more than 2,000 Mississippi school districts to 151 school districts, and were considered necessary at that time. Several types of districts in existence today are still serving well but there are flaws in each. *It appears that if there were only one type of district so that all of the laws pertaining to districts would apply to each district in the state, rather than special laws for special types of districts, the administration and operation of school districts would be more effective and beneficial to the state.*" (Emphasis added)

Excerpts of the *Report of the Senate Interim Committee to Study Public School Finance and Administration in Mississippi* are attached hereto as Appendix B.

The repeal of Section 37-7-611 and the seventy-one (71) other "special laws for special types of districts "were considered essential to effectuating the purpose of Chapter 492. It does not appear that consideration was given to any special circumstances that may have justified leaving the provisions of Section 37-7-611 in tact. It was apparently felt that the provisions of Section 52 of Chapter 492 authorizing school districts to abolish or reorganize such districts or change or alter the boundaries of any school district would still allow school districts the option to expand and at the same time extend to all school districts the same privileges.

Section 37-7-611 was first enacted at the 1953 Extraordinary Session of 1953 as Chapter 23 §6. It was revised by Chapter 29, §1, 1959 Extraordinary Session. The 1959 amendment did not change the relevant language of Section 37-7-611. Copies of these chapter laws are attached as Appendix C. Similar annexation provisions existed under earlier Mississippi Codes, e.g., see Chapter 315, § 1 of 1926 Laws, a copy of which is included in Appendix C.

Request No. 3.

Identify the minority legislators or minority citizens who specifically were consulted regarding the inclusion of this repealer in Chapter 492 and summarize the comments they provided. If no minority legislators or citizens were consulted, explain the reasons for this omission.

Response to No. 3.

Like Request Nos. 1 and 2 above, this request presupposes that the repeal of Section 37-7-611 was given separate and individual consideration and that it was viewed as something other than a house cleaning measure. Several minority legislators were instrumental in the passage of

Chapter 492. Two in particular were Representative Robert Clark and Representative Horace Buckley. They can be reached during the day at (601) 359-3770.

Request No. 4.

It has been alleged that annexations by municipalities which have municipal separate school districts generally are of predominantly white residential areas, and that the repeal of § 37-7-611's automatic boundary extension provision will permit municipal annexation of these areas and, at the same time, allow those whites to remain in predominantly white school districts that adjoin predominantly black municipal school districts. Please provide us with whatever information the state has which may be enlightening on this issue. In particular, include information on the population, by race, of any annexations proposed by "municipal school district" cities which currently are pending in a chancery court or other proceeding (if an annexation of proposed annexation includes an area that was part of the "added territory" of the municipal school district, provide the requested population data separately for the annexed "added territory" and the annexed area that was not in the municipal school district). Include the student population, by race, of each municipal separate school district in the state and each county, consolidated, and consolidated line school district that adjoins a municipal school district.

Response to Request No. 4.

The State of Mississippi does not maintain a centralized system for the reporting of municipal annexations. The U. S. Department of Justice is the only agency to our knowledge that maintains these records.

While the data sought by this request may be a permissible inquiry in the context of examining any alleged discriminatory purpose underlying the repeal of Section 37-7-611, which we submit cannot exist in this case, the

data sought, i.e. the racial composition of school population is totally irrellevant to a Section 5 inquiry.

Additionally, in view of the Section 5 preclearence requirements with respect to municipal annexations, and in light of the establishment of single member education 523 of the 1988 Laws of Mississippi, we cannot see how the repeal of Section 37-7-611 can operate so as to impermissibly dilute or restrict minority voting rights. It is noted that the *Joint Resolution Memorializing the Repeal of Section 37-7-611, Miss. Code of 1972, as amended, for Preclearance by the United States Department of Justice*, filed with your office by officials of Harrison County, Biloxi and Gulfport School Districts, as well as the officials of the cities of Gulfport and Biloxi, express the view in its accompanying cover letter that if Section 37-7-611 were to be enforced in their area, it would operate to dilute minority voting strength in the election of the members to the Harrison County School Board.

If you have any questions about this response, please contact the undersigned at (601) 359-3839, Also, Mr. Robert Davidson, who was Staff Attorney for the Senate Interim Committee to Study Public School Finance and Administration, is very familiar with the legislative history of the Uniform School Law and he can be reached at (601) 359-3217.

Sincerely,

/s/ Giles W. Bryant
Giles W. Bryant
Special Assistant Attorney General

/jw

APPENDIX Q

[SEAL]

U.S. Department of Justice
Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

March 31, 1989

Honorable Mike Moore
Attorney General
P.O. Box 220
Jackson, Mississippi 39205-0220

Dear Mr. Attorney General:

This refers to Section 47 of Chapter 492 (1986) of the State of Mississippi insofar as it repeals Section 37-7-611 of the Mississippi Code, dealing with the modification of municipal school district boundaries. We received the information to complete your submission on January 30, 1989.

We have carefully considered the information you have provided along with the comments and information received from other interested parties. As a result of our review, a number of factors emerge as being very significant to the determination the Attorney General is called upon to make in a situation of this nature.

First, Section 37-7-611 provides that when a municipality with a municipal school district annexes land that is not in the municipal school district, the boundary between the municipal school district and adjoining school districts

shall be modified to accord with the newly established municipal boundaries. Under that system, Mississippi currently has in place a mechanism whereby all political boundary disputes relating to a proposed annexation, whether they concern school or other matters, may be aired and considered in a proceeding conducted by the chancery court to determine whether the annexation should be approved.

Secondly, it appears that the state, by repealing Section 37-7-611, proposes to replace this judicial, case-by-case approach to reviewing annexations as they relate to municipal school districts with a system in which the neighboring school district can, and apparently often will, exercise veto authority over such a municipal school district annexation.

Thirdly, according to our information it is generally recognized in the state that there is a demographic trend toward the movement of whites out of the cities into suburban and rural areas while blacks are moving from the rural areas of the state into the cities. It further appears that this demographic trend may play a significant role in the opposition to annexations by school districts that neighbor a municipal district since we have noted specific recent annexation disputes where a principal issue has been opposition by predominantly white areas to transferring their students into a majority black school system.

While we recognize that demographic patterns are not uniform throughout the state, demographic data available to us suggest that the repeal of Section 37-7-611 will have a significant racial impact. According to information published by the State Department of Education, approximately half the municipal school districts in the State of Mississippi have a student population that is majority black and about two-thirds are 40 percent black or higher. Thus, with the repeal of Section 37-7-611, the long term effect appears to be that, with the movement of whites out of the cities, the municipal school systems in Mississippi will

essentially be frozen in their present boundaries with increasingly higher black population percentages and will be economically disadvantaged while neighboring school districts change in an opposite manner.

Finally, we note that the repeal of Section 37-7-611, by allowing for annexations to cities without the concomitant expansion of municipal school district boundaries, is likely to create a class of city voters (for the most part predominantly white) who will not reside in the city school system yet may vote for the city governing body which, under Mississippi law, appoints the city school board. We have received no explanation for the establishment of such a political system which appears not only to have the potential to impact negatively on the influence of minority city school district residents but also to treat black voters differently than white voters.

Under Section 5 of the Voting Rights Act, the submitting jurisdiction has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. See *Georgia* v. *United States*, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). In light of the the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that that burden has been sustained in this instance. That is especially so here, since a covered jurisdiction may not seek to establish or revise political boundary lines so as to include some voters in the jurisdiction and fence others out based on race. *Perkins* v. *Matthews*, 400 U.S. 379 (1971); *accord, City of Pleasant Grove* v. *United States*, 623 F. Supp. 782 (D.D.C. 1985), *aff'd*, 479 U.S. 462 (1987). Therefore, on behalf of the Attorney General, I must object to the repeal of Section 37-7-611.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of

Columbia that this change has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. In addition, Section 51.45 of the guidelines permits you to request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the effect of the objection by the Attorney General is to make the repeal of Section 37-7-611 legally unenforceable. 28 C.F.R. 51.10.

In addition, we wish to again bring to your attention the fact that Chapter 379 (1977), which occasioned a similar change concerning the modification of municipal school district boundaries where a municipality annexes territory outside its principal county, has not received the requisite Section 5 clearance. Accordingly, unless and until the State of Mississippi receives a declaratory judgment from the District of Columbia Court or the Attorney General grants clearance, this change also is not legally enforceable. 28 C.F.R. 51.10.

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us of the course of action the State of Mississippi plans to take with respect to this matter. If you have any questions, feel free to call Mark A. Posner (202-724-8388), an attorney in the Voting Section.

Sincerely,

/s/ James P. Turner

James P. Turner
Acting Assistant Attorney General
Civil Rights Division

APPENDIX R

STATE OF MISSISSIPPI
[SEAL]
OFFICE OF THE ATTORNEY GENERAL
TELEFAX NUMBER (601) 359-3796
CARROLL GARTIN JUSTICE BUILDING
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE (601) 359-3680

MIKE MOORE
ATTORNEY GENERAL

January 12, 1990

Mr. Barry Weinberg
Acting Chief, Voting Section
Civil Rights Division
Post Office Box 66128
Washington, D. C. 20035-6128

RE: REQUEST FOR RECONSIDERATION OF THE LIMITED PRECLEARANCE OF CHAPTER 492 (1986), OR ALTERNATIVELY, FOR RECONSIDERATION OF OBJECTION TO REPEAL OF SECTION 37-7-611, MISS. CODE OF 1972, BY CHAPTER 492, § 47 (1986)

Dear Mr. Weinberg:

Please find enclosed the above-referenced request for reconsideration in accordance with 28 C.F.R. §51.45. As set forth herein, we also request a conference as authorized by 28 C.F.R. §51.47(a).

Sincerely,

Mike Moore, Attorney General

By: /s/ Giles W. Bryant
Giles W. Bryant
Special Assistant Attorney General

jw
Enclosures

REQUEST FOR RECONSIDERATION UNDER 28 C.F.R. § 51.45

TO: THE ATTORNEY GENERAL OF THE UNITED STATES, HONORABLE RICHARD THORNBURG

REQUEST FOR RECONSIDERATION OF THE LIMITED PRECLEARANCE OF CHAPTER 492 (1986), OR ALTERNATIVELY, FOR RECONSIDERATION OF OBJECTION TO REPEAL OF SECTION 37-7-611, MISS. CODE OF 1972, BY CHAPTER 492, § 47 (1986)

In accordance with 28 C.F.R. § 51.45 and the Voting Rights Act of 1965, 42 U.S.C. § 1973c, the Attorney General of the State of Mississippi, on behalf of the State of Mississippi, hereby requests the Attorney General of the United States to reconsider the limited preclearance of Chapter 492 (1986) rendered on August 29, 1986, or alternatively, to reconsider the March 31, 1989 objection to Chapter 492, § 47 (1986) insofar as it repeals Section 37-7-611, Miss. Code of 1972.

I.

REQUEST FOR CONFERENCE IN ACCORDANCE WITH 28 C.F.R. § 51.47

The Attorney General of the State of Mississippi also requests a conference as authorized by 28 C.F.R. § 51.47(a) in connection with this request for reconsideration, such conference to be held at a place and time to be determined by the Attorney General of the United States in accordance with 28 C.F.R. § 51.47(b).

II.

SUMMARY OF ARGUMENT IN SUPPORT OF RECONSIDERATION

Chapter 492 (1986) was submitted in its entirety on December 30, 1986, together with a comparative analysis

of each section of that law. The submission satisfied the requirements of 28 C.F.R. § 51.27. There was no authority for the Attorney General to grant only limited preclearance. Accordingly, the Attorney General should reconsider this limited preclearance and preclear the law as submitted—in its entirety.

The repeal of Section 37-7-611 was based on the legislative finding that public educational opportunities available to students residing in rural areas of Mississippi were substandard to those offered to students residing in urban areas. The purpose underlying the repeal of Section 37-7-611 was to protect the ad valorem tax base available to county school systems in the path of municipal expansions. The repeal of Section 37-7-611 was an educational policy decision totally unrelated to voting rights considerations, and the Attorney General's objection to this law completely frustrates the State of Mississippi's efforts to offer better educational opportunities to its students attending county and consolidated school systems.

Finally, the real basis of the Attorney General of the United States' March 31, 1989 objection to the repeal of Section 37-7-611, Mississippi Code of 1972, is its purported effect on school enrollment population and not its effect on voting population or any other voting concerns. The demographic trends relied on in the March 31, 1989 objection letter are erroneous. Most importantly, even if these demographic trends were present in Mississippi, the repeal of Section 37-7-611 can only impact one type of school election i.e., school bond issue elections, and the repeal of Section 37-7-611 simply cannot operate to minimize black voting strength in such elections.

III.

SECTION 37-7-611 AND ITS SUBMISSION HISTORY

Section 37-7-611, Mississippi Code of 1972, provided that whenever a municipality annexed adjoining territory which

included any part of an existing adjacent school district, then that part of the adjacent school district automatically merged with the municipalities' municipal separate school district. The actual language of Section 37-7-611 provided in part as follows:

> **§ 37-7-611 Merging of Adjacent School Districts:**
>
> "Where the corporate limits of any municipality which constitutes a municipal separate school district, either with or without added territory, are extended so as to include the whole or any part of an existing adjacent school district in the county school system or municipal separate district, then such adjacent school district, or such part thereof as is included within the corporate limits of the municipality by reason of the extension thereof, shall thereby automatically be merged with and become a part of such municipal separate school district.

The remaining provisions of Section 37-7-611 pertained to annexations that take effect after September 1 of any fiscal year of the adjacent school district; and also pertained to the effect of annexations that include or exclude school buildings, and to related matters.

Section 37-7-611 was repealed in 1986 by Section 47 of Chapter 492, 1986 Laws of Mississippi. Chapter 492, otherwise referred to as the Uniform School Law of 1986, was submitted for preclearance under Section 5 of the voting Rights Act of 1965 on July 22, 1986. Attached hereto as Appendix "A" is a copy of the state's submission statement (without exhibits). Thirteen sections of Chapter 492 were specifically outlined in the state's submission. (i.e., Sections 9, 25, 52, 53, 54, 55, 56, 153, 163, 164, 170,

185 and Section 203.) The submission statement at page 2 thereof contained the following language, "for the sake of brevity, the submission will only set forth the particular sections which deal primarily with voting rights even though the complete act is submitted for review." Chapter 492 (1986) was submitted in its entirety.

Most importantly, a loose-leaf notebook entitled **"Senate Bill Number 2117—Comparison of Current Law and New Law"** was attached to the submission statement as Exhibit "C" thereof. Due to its length, this comparative analysis is not included with this request for reconsideration. However, it was part of the original submission of Chapter 492 and should be on file in the United States Department of Justice. Also, it will be produced at any conference set by the Attorney General in connection with the instant request.

On August 29, 1986, the Attorney General of the United States precleared Chapter 492 as to those sections specified in the state's submission statement. A copy of this preclearance letter is attached hereto as Appendix "B".

Due to the uncertainty surrounding the Section 5 status of other sections of Chapter 492 and since the Section 5 status of certain sections of Chapter 492 was raised in *Kirksey, et al v. Pittman*, U.S.D.C. (S.D. Miss.), Civil Action No. J86-558(B), the State of Mississippi on April 30, 1987 submitted for Section 5 preclearance Sections 60 and 84 of Chapter 482 (1986), which were precleared on July 9, 1987. On December 30, 1987, the state submitted for Section 5 preclearance, Section 47 of Chapter 492 (1986), insofar as it repealed Section 37-7-611. The state's submission statement (without exhibits) is attached hereto as Appendix "C". On February 29, 1988, the State of Mississippi was advised that the information submitted in support of the preclearance of the repeal of Section 37-7-611 was insufficient and additional information was requested. The February 29, 1988 letter requesting additional information is attached hereto as Appendix "D".

Due to a change in personnel and intervening statewide elections, together with the usual extensiveness of the request for additional information, the state was not able to provide the requested information until January 27, 1989. A copy of the state's response is attached hereto as Appendix "E". On March 31, 1989, the Attorney General of the United States objected to the implementation of Section 47 of Chapter 492 (1986) insofar as it repealed Section 37-7-611. Since this letter forms the basis of this request, it is set out in substantial part as follows without indentation, to-wit:

* * *

[See Appendix J, pp. 137a-140a]

* * *

IV.

ARGUMENT

IV(A).

THE ATTORNEY GENERAL OF THE UNITED STATES HAS NO AUTHORITY UNDER 28 C.F.R., PART 51 TO GRANT ONLY LIMITED PRECLEARANCE TO A LAW THAT IS SUBMITTED IN ITS ENTIRETY

The state's submission of Chapter 492 clearly specified that it was being made in its entirety. Included with the submission was a detailed comparison of the "current and new law." Each section of Chapter 492 was properly explained. With respect to Section 47, even though the repealed sections were not set out, they were sufficiently described as providing for the creation and operation of municipal separate school districts.

The federal regulations implementing 42 U.S.C. § 1973c provide that if the Attorney General fails to make a written response within the sixty (60) day review period that such failure constitutes preclearance of the submitted

change (28 C.F.R. § 51.42). There was no written response as to any sections of Chapter 492 except for those specified in the state's submission statement.

Without question, covered jurisdictions have the burden of proof in submitting election changes for preclearance under Section 5, 28 C.F.R. § 51.52, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), *McCain v. Lylrand*, 465 U.S. 236 (1984). In *McCain v. Lylrand*, the Supreme Court stated:

> "When a jurisdiction adopts legislation that makes clearly defined changes in its election practices sending that legislation to the Attorney General merely with a general request for preclearance pursuant to § 5 constitutes a submission of the changes made by the enactment . . . " 465 U.S. at 256.

In submitting Chapter 492 (1986), the state clearly submitted it in its entirety and included with the submission a comparative analysis of each section. Its submission clearly satisfied 28 C.F.R. § 51.27 as it existed in 1986 at the time of submission. There was no requirement at that time that a copy of the document setting forth the voting practice to be replaced be provided as is now required by 28 C.F.R. 51.27(b). If the Attorney General determined that the state's submission was insufficient or incomplete, he should have requested additional information in accordance with 28 C.F.R. § 51.37. There was simply no authority at the time of this submission to grant limited preclearance in the face of a law submitted in its entirety. Accordingly, Chapter 492 (1986) should have been precleared in its entirety on August 29, 1986, and the State of Mississippi hereby requests that the Attorney General of the United States reconsider its limited preclearance of Chapter 492 and preclear this law as submitted—in its entirety.

IV(B).

SECTION 47 OF CHAPTER 492 (1986) INSOFAR AS IT REPEALS SECTION 37-7-611, MISSISSIPPI CODE OF 1972 HAS NEITHER THE PURPOSE NOR THE EFFECT OF DENYING OR ABRIDGING THE RIGHT TO VOTE ON ACCOUNT OF RACE

(THE PURPOSE)

In the state's submission of the repeal of Section 37-7-611, as well as in the response to the request for additional information, the state described the purpose behind the repeal as part of an overall purpose underlying Chapter 492 of placing all school districts on an equal footing by granting to all districts the same prerogatives, powers, duties, and privileges as provided in this act.

Apparently, the statements in our submission that the repeal of Section 37-7-611 was subject to little legislative debate and was considered a housekeeping measure have been misinterpreted as minimizing the educational importance of the repeal of Section 37-7-611. As set forth in our submission and our subsequent response to the request for additional information, the repeal of Section 37-7-611 was considered essential to effectuating the purpose of Chapter 492. The **"Report of the Senate Interim Committee to Study Public School Finance and Administration in Mississippi"**, as set forth in our earlier response, stated in part:

> Several types of districts in existence today are still serving well but there are flaws in each. It appears that if there were only one type of district so that all of the laws pertaining to districts would apply to each district in the state, rather than special laws for special types of districts, the administration and operation of school districts would be more effective and beneficial to the state.

If the Attorney General's objection to the repeal of Section 37-7-611 is ultimately interpreted as requiring the automatic acquisition of territory, students and personnel of adjacent county or consolidated school districts by municipal separate school districts involved in municipal annexations, then the Attorney General's objection, under the guise of protecting unaffected minority voting rights, totally frustrates the above educational purpose.

It should be pointed out that in view of *Prentiss County Annexation Committee v. City of Booneville*, 551 So.2d 890 (Miss. 1989) and *Dotson v. City of Indianola*, 514 F.Supp. 397 (N. D. Miss. 1981) and the language of 42 U.S.C. §1973c, the sole effect of the Attorney General's objection could be limited to precluding the participation of newly annexed voters in municipal elections if such voters reside within the boundaries of an adjacent county or consolidated school district. As set forth in a proposed law review article entitled "Impact of the Voting Rights Act of 1965 Upon the Uniform School Law of 1986" by J. Robertshaw, a copy of which is attached hereto as Appendix "F", the Attorney General's objection to the repeal of Section 37-7-611 could be interpreted as not affecting where school age children attend school and which school district will levy and receive school taxes. Quoting directly from the proposed article at page 11:

> Thus, the sole remedy for failure to obtain preclearance is a ban on enforcement of any "qualification, prerequisite, standard, practice or procedure **with respect to voting.**" In **Dotson,** there being no "de-annexation", residents of the un-precleared annexations were not allowed to vote or run for municipal services. Here, there is a possibility residents of the annexed portion of PCSD may not vote for aldermen or councilmen, whichever, but whatever the AGUS does they will continue to pay school taxes to PCSD, and PCSD will continue to educate pupils from

that territory. This is the **substantive** effect of repealing § 37-7-611, totally unrelated to any "qualification, prerequisite, standard, practice or procedure with respect to voting."

By submitting this request for reconsideration of the Attorney General's objection to the repeal of Section 37-7-611, the State of Mississippi does not waive its right to argue that the effect of the objection is limited to the voting concerns only and does not extend to the issue of where children will attend school nor to the issue of which school district will levy and receive taxes.

1. The Affidavit of Senator Irb Benjamin.

In support of this request for reconsideration, the State of Mississippi submits that consideration be given to the matters contained in the attached affidavit of Senator Irb Benjamin, Chairman of the Senate Education Committee of the Mississippi Legislature. As set forth in this affidavit, the clear purpose of the repeal of Section 37-7-611 was to protect the ad valorem tax base available to county school systems in the path of municipal expansion. As Senator Benjamin states, there was considerable evidence prior to the enactment of Chapter 492 that educational opportunities available to students residing in rural areas of our state were substandard to those offered to students residing in urban areas. This affidavit is attached as Appendix "G".

2. The 1986 Annual Report of the State Superintendent of Public Education (Section VII).

Additional support of this legislative finding is found in the 1986 Annual Report of the State Superintendent of Public Education, a copy of Section VII (pages 143-153) of which is attached hereto as Appendix "H".

In the 1986 Annual Report of the State Superintendent of Public Education revenue and expenditure statistics were presented for the 1984-85 school year. According to

that report, there were 154 school districts in the State of Mississippi. Fifty-eight (58) of these were municipal separate school districts and the remaining ninety-six (96) were county school districts and consolidated school districts.

The superintendent's report at pages 150 through 153 ranks the school districts according to wealth per average pupil unit and ad valorem tax collected per average pupil unit. The school districts are listed first by county district or consolidated district, followed, where appropriate, by the municipal district(s) in that county.

For purposes here, the lower one-third in ad valorem tax collected per average pupil unit are listed in descending order:

1984 - 1985

SCHOOL DISTRICTS WITH LOWEST AD VALOREM TAX COLLECTED PER AVERAGE PUPIL UNIT

154 Nettleton Line Cons.
153 Neshoba County Dist.
152 Union County Dist.
151 North Tippah Cons.
150 Prentiss County Dist.
149 Oktibbeha County Dist.
148 Wilkinson County Dist.
147 Durant Mun. Separate
146 Alcorn County Dist.
145 Marshall County Dist.
144 Canton Mun. Separate
(128) Simpson County Dist.
(127) Water Valley Cons.
(126) Pontotoc County Dist.
(125) Holmes County Dist.
(124) Benton County Dist.
(123) Wayne County Dist.
(122) West Jasper Cons.
(121) Choctaw County Dist.
(120) Lee County Dist.
(119) South Tippah Cons.
(118) East Tallahatchie Cons.

143 Lauderdale County Dist.
142 Baldwyn Mun. Separate
141 Leake County Dist.
140 Monroe County Dist.
139 Newton County Dist.
138 Chickasaw County Dist.
137 Anguilla Line Cons.
136 Enterprise Cons.
135 Calhoun County Dist.
134 Pearl River County Dist.
133 George County Dist.
132 Scott County Dist.
131 Tate County Dist.
130 Greene County Dist.
129 Tishomingo County Dist.
(117) South Panola Cons.
(116) Iuka Mun. Separate
(115) Lafayette County Dist.
(114) Jefferson Davis County Dist.
(113) Lowndes County Dist.
(112) Webster County Dist.
(111) Lincoln County Dist.
(110) Richton Mun. Separate
(109) Walthall County Dist.
(108) Copiah County Dist.
(107) Sunflower County Dist.
(106) Jefferson County Dist.
(105) Noxubee County Dist.
(104) Marion County Dist.

Of the above fifty-one (51) school districts which during the 1984-1985 school year had the lowest ad valorem tax collected per average pupil unit, forty-six (46) were county school districts or consolidated districts. Only five (5) of these districts were municipal separate school districts. The repeal of Section 37-7-611 was considered vital to the protection of the ad valorem tax base of these county school districts and consolidated school districts.

THE EFFECT

The repeal of Section 37-7-611 and the amendment to Section 37-7-103 by Section 52 of Chapter 492 would have the effect of furthering the overall purpose of Chapter 492. Chapter 492, Section 52 was precleared under Section 5 on August 29, 1986. It amends Section 37-7-103 by providing as follows:

> "37-7-103 from and after July 1, 1987, the school board of any school district shall have full jurisdiction, power and authority, at any regular meeting thereof or at any special meeting called

> for that purpose to abolish such existing district, or to reorganize, change or alter the boundaries of any such district. In addition, thereto, with the consent of the school board of the school district involved, the school board may add to such school district any part of the school district adjoining same and with the consent of the school board of the school board of the school district involved, may attach territory from such school district and annex same to an adjoining district.

The purpose underlying Section 37-7-103 was to allow school districts to alter their boundaries in cooperation with adjoining districts without giving any one district the right to take territory, students and teachers from the other. This is an educational policy decision made by the Mississippi Legislature and it offends all notions of federal/state relations for the Attorney General to supplant the policy decisions of the state by vetoing this policy on non-existent voting concerns.

As the Department of Justice is fully aware from its experience with municipal annexations. One of the most frequent objections to municipal annexation is the disruption it causes to adjoining school districts. The reason for this disruption is Section 37-7-611.

3. **Deposition of Jauney Lynn.**

The Mississippi Association of Educators is very interested in the repeal of Section 37-7-611 due to its disruptive effect on schools, teachers, students and education in Mississippi. Attached hereto as Appendix "I" is a copy of a deposition of Jauney Lynn, the former Director of the Mississippi Association of Educators which illustrates some of the problems caused by the automatic extension of school boundaries resulting from municipal annexations. The MAE is an objector in the Gulfport, Mississippi annexation proceeding because of the disruptive effect of Section 37-7-611 on the adjacent school district.

4. Affidavit of Joseph A. Luesteck.

The requirements of Section 37-7-611 have also been problematic for municipalities in their expansion efforts. Mr. Joseph A. Leusteck a city planner who has testified as an expert witness for various municipalities in connection with municipal annexations describes in his affidavit the problems Section 37-7-611 causes municipalities and further demonstrates the fact that there is no logical relationship between the factors and considerations which support municipal expansions and those that support the expansion of school boundaries. In addition Mr. Luesteck's affidavit also describes the disruptive aspects of Section 37-7-611 on school districts. The affidavit of Joseph A. Luesteck is attached hereto as Appendix "J".

It is clear from the above that the real effect of the repeal of Section 37-7-611 is that increased educational opportunities can be given to students in county school districts, that municipal expansions can proceed uninhibited by factors which bear no real relationship to the issue of municipal expansions and that the disruptive effect that Section 37-7-611 has on schools, teachers, students and education in Mississippi will be removed.

IV(C)

THE EFFECT OF THE REPEAL OF SECTION 37-7-611 SET FORTH IN THE MARCH 31, 1989 OBJECTION LETTER IS BASED ON ERRONEOUS FACTUAL AND LEGAL CONCLUSIONS

The March 31, 1989 objection letter is predicated on the fact that in Mississippi municipalities are becoming increasingly black and that suburban and rural areas are becoming increasing white. This is incorrect. While these demographic trends may exist in highly urbanized and industrialized states of the North and Northeast they do not exist in Mississippi.

Mississippi has fifty seven (57) municipalities that have municipal separate school districts. Thirty three (33) of these municipalities have populations under 10,000 and twenty four (24) have populations above 10,000.

With respect to the thirty three (33) municipalities with populations under 10,000 only seven (7) reflected a loss in white population between 1970 and 1980. Of these seven (7) municipalities, one municipality, Hazlehurst, Mississippi, also reflected a loss in black population. Accordingly, only six (6) municipalities of the thirty three (33) municipalities that have populations under 10,000 reflected a loss in white population with no loss in black population. Significantly, the total combined loss in white population for these six (6) municipalities is 417 persons.

The above demographic findings are reflected by the following table which is based in 1970 and 1980 census figures.

(TABLE I)

MISSISSIPPI MUNICIPALITIES WITH POPULATIONS UNDER 10,000 WHICH HAVE SEPARATE MUNICIPAL SCHOOL DISTRICTS

	1970 Population		1980 Population	
Municipality	White	Black	White	Black
Aberdeen	3,621	2,533	4,028	3,142
Amory	5,509	1,726	5,632	1,660
Baldwyn	1,539	826	2,171	1,250
Bay St. Louis	5,323	1,416	6,370	1,433
Booneville	4,991	903	5,361	815
Clinton	6,584	658	13,506	1,059
Columbia	5,452	2,117	5,649	2,060
Drew	1,365	1,194	1,217	1,301
Durant	1,406	1,344	1,359	1,528
Forrest	2,655	1,423	2,975	2,241
Hazlehurst	1,956	2,617	1,863	2,568
Holly Springs	2,317	3,389	2,633	4,618

Houston	2,004	712	2,627	1,112
Indianola	3,903	5,000	4,047	4,148
Iuka	2,132	257	2,524	274
Kosciusko	4,599	2,644	4,591	2,798
Long Beach	5,866	246	7,383	414
Louisville	4,080	2,539	4,207	3,097
New Albany	4,877	1,543	5,463	1,586
Newton	2,250	1,299	2,148	1,552
Ocean Springs	8,773	783	13,254	1,009
Okolona	1,945	1,057	1,939	1,461
Pass Christian	2,110	862	3,199	1,720
Pearl	9,599	10	18,307	2,341
Petal	6,812	162	8,295	159
Philadelphia	4,335	1,907	4,447	1,832
Pontotoc	2,882	567	3,959	751
Richton	792	316	880	324
Ridgeland	1,538	109	4,854	565
Senatobia	3,060	1,182	3,523	1,467
Union	1,299	553	1,320	606
West Point	4,925	3,783	4,819	3,955
Winona	3,319	2,195	3,830	2,341

Furthermore, of the above thirty three (33) municipalities only five (5) municipalities have majority black populations according to the 1980 census figures i.e. Drew, Durant, Hazlehurst, Holly Springs, and Indianola, Mississippi.

With respect to the twenty four (24) municipalities that have separate municipal school districts and have populations over 10,000 only thirteen (13) reflected a loss in white population between 1970 and 1980 (not included in the summary are Biloxi and Gulfport which suffered a unique loss of population between 1970 and 1980 due to hurricane Camille and the reduction in military forces at Keesler Air Force Base following the end of the Vietnam War.)

Of these thirteen (13) municipalities losing white population between 1970 and 1980, three (3) Laurel, Greenwood and Oxford reflected a loss in both white and black population. Of the remaining ten (10) municipalities the total combined loss in white population is only 13,672.

The above demographic findings are reflected by the following table which is based on 1970 and 1980 census figures.

(TABLE II)

MISSISSIPPI MUNICIPALITIES WITH POPULATIONS OVER 10,000 WHICH HAVE SEPARATE MUNICIPAL SCHOOL DISTRICTS

	1970 Population		1980 Population	
Municipality	White	Black	White	Black
Brookhaven	6,650	4,037	6,421	4,358
Canton	4,550	5,946	3,823	7,269
Clarksdale	9,840	11,703	7,984	13,022
Cleveland	8,284	4,919	8,674	5,711
Columbus	16,021	9,721	15,070	12,126
Corinth	9,337	2,228	11,332	2,446
Greenville	18,835	20,619	16,181	24,137
Greenwood	11,118	11,130	9,510	10,460
Hattiesburg	27,133	11,024	26,295	13,995
Jackson	92,651	61,063	106,285	95,357
Laurel	15,201	8,914	13,191	8,661
McComb	7,971	3,990	7,807	4,469
Meridian	29,880	15,106	28,916	17,397
Moss Point	10,929	8,366	6,518	12,437
Natchez	9,733	9,959	10,514	11,447
Oxford	11,323	2,362	7,635	2,098
Pascagoula	23,663	3,564	24,005	4,920
Picayune	6,932	3,531	6,961	3,351
Starkville	8,479	2,798	11,019	3,823

Tupelo	16,874	3,579	19,447	4,327
Vicksburg	12,824	12,568	11,956	13,331
Yazoo City	4,312	6,469	6,325	6,049

Of the above twenty four (24) municipalities, only seven (7) have majority black populations according to the 1980 census figures i.e. Canton, Clarksdale, Greenwood, Moss Point, Natchez, Vicksburg and Greenville. Two (2) of these municipalities Natchez and Vicksburg have county-wide districts and accordingly are not relevant to the issue involved with the repeal of Section 37-7-611.

The Attorney General's March 31, 1989 objection to the repeal of Section 37-7-611 is based on the erroneous demographic finding that there is a trend in the state of blacks migrating to the cities and whites migrating out of the cities. As demonstrated above, there is no such trend in Mississippi. Accordingly, the Attorney General's objection should be withdrawn.

Furthermore, the Attorney General's March 31, 1989 objection to the repeal of Section 37-7-611 relies on statistics from the Mississippi State Department of Education which indicate that approximately half the municipal school districts in the state have a student population that is majority black and about two-thirds are 40 percent black or higher. Student enrollment population cannot properly serve as basis for measuring the effect of a voting change under Section 5 of the Voting Rights Act. Only total population or total voting age population can be relied upon to measure whether a voting change has a retrogressive effect. *Burns v. Richardson*, 384 U.S. 73 (1966); *Martin v. Venables*, 401 F.Supp. 611 (1975); *Klahr v. Williams*, 313 F.Supp. 148 (1970), aff'd sub nom., *Ely v. Klahr*, 403 U.S. 108 (1971); *Borneau v. Thornton*, 235 F.Supp. 175 (1964), 379 U.S. 15 (1964).

Perhaps the most critical point that can be made in connection with the absence of any adverse effect that repealing Section 37-7-611 will have on minority voters is

that even if the demographic trends cited in the Attorney General's March 31, 1989 letter were correct, the objection is still unwarranted.

To understand this point, assume that a majority black municipality or a municipality with a significant black voting age population annexes territory that is predominantly white. Here, the Attorney General's letter strains to articulate an adverse effect on minority voting. The purported adverse impact is that these newly annexed white voters will impact the selection of the governing authorities who in turn will appoint the school board members. In struggling to find and articulate an adverse impact on minority voting rights, the Attorney General has overlooked the fact that the above result will occur with or without Section 37-7-611. If a group of voters are annexed into a municipality, they will impact the selection of the governing authorities. The Attorney General cannot properly base his objection on a result that will occur with or without his objection. This, then is a non-issue. If the effect of the objection is interpreted as not affecting where students attend school and which district receives taxes, then its only effect would be that newly annexed voters could not participate in municipal elections if they reside within the boundaries of a county or consolidated school district. If a municipal annexation is precleared under Section 5, such preclearance would mean that the influx of such voters would not operate to diminish black voting strength within the municipality. Not to allow these voters to participate in municipal annexation because of a standing objection to the repeal of § 37-7-611 will have an effect that no one, including the Justice Department, could view as desirable. Another non-issue is the corresponding effect that these newly annexed voters will have on the selection of the school trustees in the adjoining county district or consolidated district. Again, assuming these rural or suburban districts are majority white, as the Attorney General's letter assumes, then allowing the newly annexed

white voters to vote for the trustees of county or consolidated school districts cannot minimize black voting strength. This is especially true in light of the new requirements of Chapters 444 and 523 (1988) which require single member districts for county and consolidated school districts. Furthermore, the repeal of Section 37-7-611 has the effect of preserving the status quo with respect to the racial composition of the adjacent countywide consolidated school districts and under *Beer v. United States*, 425 U.S. 130 (1976), preserving the status quo cannot violate Section 5.

Since municipal school board members are appointed, the only school election that these voters can participate in is school bond elections. Section 37-59-15, Miss. Code Ann. (Supp. 1989) governs the conduct of school bond elections. It provides in part as follows:

> **§ 39-59-15 Conduct of Election**
>
> Such election shall be held upon order of the school board, as for as is practicable, in the same manner as other elections are held in such county or municipality. *At such election, all qualified electors of such school district may vote.* (Emphasis added.)

The statute requires that only qualified electors of the school district can vote in such an election. It is this election that the Attorney General must use in measuring the effect of the repeal of Section 37-7-611 on minority voters. Viewing this type of election, in light of the factual situation relied upon by the Attorney General, and also assuming racial bloc voting, which the Attorney General always does, the only possible result that the repeal of Section 37-7-611 can have on minority voters in municipal separate school districts is an ameliorative one. The repeal of Section 37-7-611, under these assumed facts, can only enhance minority voting strength in municipal school bond elections. Under *Beer v. United States*, 425 U.S. 130 (1976),

if a change that affects voting "enhances the position of racial minorities with respect to their effective exercise of the electoral franchise, [it] can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of § 5" 425 U.S. at 141.

If the repeal of Section 37-7-611 is precleared, the newly annexed white voters would not automatically participate in municipal school bond elections since they would not be included in the district unless they were brought in under Section 37-7-103, which would require Section 5 preclearance. If Section 37-7-611 is not precleared, then these newly annexed white voters could minimize the black voting strength in any school bond election. Either the Attorney General completely overlooked this fact, which we hope is the case, or he ignored his Section 5 responsibility to effectuate an educational goal that is unrelated to his responsibilities under Section 5.

APPLICATION OF SECTION 2 OF THE VOTING RIGHTS ACT TO SECTION 5 PRECLEARANCE SUBMISSIONS IS PROHIBITED

To the extent that the Attorney General's objection to the repeal of Section 37-7-611 is in any way predicated on Section 2 considerations, as hereinafter set forth, such an application of Section 2 considerations to a Section 5 submission is prohibited.

Under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, certain states and political subdivisions subject to the Act may not enforce "any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting [hereinafter 'procedure'] different from that in force or effect on November 1, 1964," unless they have obtained a declaratory judgment from the United States District Court for the District of Columbia that such change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account

of face or color," or have submitted the proposed change to the United States Attorney General and the Attorney General has "precleared" the change, *i.e.*, has not objected to it within 60 days of the submission.

The purpose of Section 5's preclearance requirement was set forth by the Supreme Court in *Beer v. United States*, 425 U.S. 130, 140-141 (1976):

> The legislative history reveals that the basic purpose of Congress in enacting the Voting Rights Act was "to rid the country of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S., at 315. Section 5 was intended to play an important role in achieving that goal:
>
> > "Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old one had been struck down. That practice had been possible because each new law remained in effect until the Justice Department or private plaintiffs were able to sustain the burden of proving that the new law, too, was discriminatory. . . . Congress therefore decided, as the Supreme Court held it could, 'to shift the advantage of time and inertia from the perpetrators of the evil to its victim,' by 'freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory.' " H.R. Rep. No. 94-196, pp. 57-58. (Footnotes omitted.)
>
> * * *
>
> By prohibiting the enforcement of a voting-procedure change until it has been demonstrated to the United States Department of Justice or to a three-judge federal court that the change

> does not have a discriminatory effect, Congress desired to prevent States from "undo[ing] or defeat[ing] the rights recently won" by Negroes. H.R. Rep. No. 91-397, p. 8. Section 5 was intended "to insure that [the gains thus far achieved in minority political participation] shall not be destroyed through new [discriminatory] procedures and techniques." S. Rep. No. 94-295, p. 19.

In sustaining the constitutionality of the preclearance requirement, the Supreme Court acknowledged that this suspension of new voting regulations pending federal scrutiny is "an uncommon exercise of congressional power," but observed that it was adopted solely to bar new retrogressive State enactments, and its constitutionality was sustained on this basis. *South Carolina v. Katzenbach*, 383 U.S. 301, 334-35 (1966).

In *Beer*, the lower court interpreted § 5 as barring preclearance of statutes which *dilute voting power*, and looked to " 'access to the political process * * * [as] the barometer of dilution of minority voting strength.' " 374 F. Supp. 363, 384 (D.D.C. 1974), *quoting Zimmer v. McKeithen*, 485 F.2d 1297, 1303 (5th Cir. 1973) (en banc), *aff'd on other grounds, East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976). In determing whether " 'the political processes leading to nomination and election were * * * equally open to participation by the group in question— [or whether] its members had less opportunity than did other residents of the district to participate in the political processes and to elect legislators of their choice,' " this Court relied upon cases interpreting § 2 as imposing the equivalent of the "results" test and looked to the factors traditionally applied and the evidence ordinarily adduced under that test. *Beer*, 374 F. Supp. at 384.

On appeal of the Beer case to the Supreme Court, the United States argued that the lower court "properly held

that dilution of voting strength on a racial basis is encompassed within the 'denying or abridging the right to vote' standard of Section 5 of the Voting Rights Act." [Brief for the United States (No. 73-1869), attached hereto as Appendix "K", p. 11.

The Supreme Court rejected this argument despite its express acknowledgment "that the basic purpose of Congress in enacting the Voting Rights Act was 'to rid the country of racial discrimination in voting.' " 425 U.S. at 104-41, *quoting Katzenbach*, 383 U.S. at 315. *Beer*, accordingly, forecloses any denial of preclearance based upon any standard other than retrogression and discriminatory purpose.

In its Reply Brief in *City of Lockhart v. United States*, 460 U.S. 125 (1983), the United States recognized the limits of Section 5, and stated:

> The 1982 amendments make no changes in the existing preclearance standards in Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. * * *
>
> * * *
>
> Under appellee Cano's interpretation, Congress has expanded Section 5 to include an assessment of not only the "purpose" and "effect," but also the "results" of all proposed voting changes—and has done so without making any change in the language of Section 5. In these circumstances, we caution against according controlling significance to the references in the legislative history cited by appellee Cano. Cf. *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979); *SEC v. Sloan*, 436 U.S. 103, 121 (1978). The Court in *Beer v. United States, supra*, construed the "effects" standard in Section 5 to mean only "retrogression." The 1982 amendments to the Voting Rights

> Act suggest no congressional intent to overrule *Beer*. [Reply Brief for the United States, No. 81-802 (Appendix "L" hereto), pp. 2-4.]

By contrast, Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, as originally enacted and as subsequently amended, has an entirely different focus and provides entirely different remedies. As originally enacted, Section 2 tracked the language of the Fifteenth Amendment, prohibiting all states and political subdivisions from imposing or applying laws "to deny or abridge the right of any citizen of the United States to vote on account of race or color."[1] Under the leading lower court case of *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds, East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976), plaintiffs could prevail in a Section 2 case either by proving discriminatory intent or discriminatory "results," *i.e.*, by showing that the electoral system resulted in a denial of equal access to the political process. However, in 1980, a plurality of the Supreme Court held that proof of discriminatory "results" alone was insufficient to establish a violation of the Fifteenth Amendment and Section 2. The Court required proof that a contested electoral mechanism was intentionally adopted for a discriminatory purpose in order to establish such a violation. *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

In reaction to *City of Mobile*, Congress in 1982 amended Section 2 to prohibit any state practice "which results in a denial or abridgement of the right * * * to vote on ac-

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[1] Section 2 provided:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title.

Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965).

count of race * * *. A violation of [Section 2] is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [racial minority] * * * in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 96 Stat. at 134, codified at 42 U.S.C. § 1973 (1986). The legislative history of the amendment to Section 2 explains that the new language was intended "to make clear that proof of discriminatory intent is not required to establish a violation of Section 2." S. Rep. No. 417, 97th Cong., 2d. Sess. 2.

The Supreme Court has frequently observed that "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Produce Safety Com'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1982). Section 5 states what the standard in a preclearance proceeding will be, and that standard differs materially from the standard under Section 2 as amended in 1982.

Section 5 provides, in pertinent part, that a covered state or political subdivision may institute an action in this Court "for a declaratory judgment that [a new voting] qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color * * *." By contrast, Section 2, as amended in 1982, provides in pertinent part that a violation

> is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its

> members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. 42 U.S.C. § 1973.[2]

Section 2 was in 1982, and is now, understood to establish a "results" test, as opposed to the retrogressive "purpose and effect" test of Section 5.

In the Voting Rights Amendments of 1982, Congress reenacted Section 5 without altering it by so much as a single word. This circumstance is clear evidence against any contention that Congress intended to change the standard of Section 5. The situation parallels that in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982). Against the background of Supreme Court decisions construing the statute, "the fact that a comprehensive reexamination and significant amendment of the

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[2] The amended Section 2 reads in full:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of face or color, or in contravention of the guarantees set forth in section 4(f)(2) as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

[Voting Rights Act] left intact the statutory provisions under which [preclearance was to be granted if the State could establish that there had been no retrogressive purpose or effect] is itself evidence that Congress affirmatively intended to preserve that [standard]." *Cf. id.* at 381-82. As the Court noted:

> "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change, see *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414, n.8 (1975); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951); *National Lead Co. v. United States*, 252 U.S. 140, 147 (1920); 2A C. Sands, Sutherland on Statutory Construction § 49.09 and cases cited (4th ed. 1973)."

Merrill Lynch, 456 U.S. at 382 n.66, *quoting Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

This principle was followed with respect to Section 5 itself in *Georgia v. United States*, 411 U.S. 526 (1973). The question there was whether Section 5 applies to election law changes which were undertaken as part of a State reapportionment of its legislative districts. The Court had held that it does so in *Allen v. State Board of Elections*, 393 U.S. 544 (1969). Referring to the *Allen* decision, the Court said in *Georgia*:

> Had Congress disagreed with the interpretation of § 5 in *Allen*, it had ample opportunity to amend the statute. After extensive deliberations in 1970 on bills to extend the Voting Rights Act, during which the *Allen* case was repeatedly discussed, the Act was extended for five years, without any substantive modification of § 5. Pub. L. 91-285, 84 Stat. 314, 315. We can only conclude, then, that *Allen* correctly interpreted the congressional design * * *.

411 U.S. at 533 (footnote omitted).

Of course, the applicability of this rule of construction is valid only on the premise that Congress was fully aware of the construction in question. In this instance, there can be no doubt concerning Congress' awareness of the Supreme Court decisions construing Section 5, for the relevant hearings and committee reports demonstrate a full examination of the Supreme Court's Voting Rights Act decisions. Indeed, the absence of any amendment to Section 5 is especially compelling evidence that no change was intended therein in light of the fact that one of the major changes in law wrought by the 1982 Amendments was the revision of Section 2 to reflect Congressional disapproval of the Supreme Court's construction of Section 2 in *City of Mobile*.[3]

Accordingly, Mississippi contends that the United States Attorney General may not use Section 2 standards in Section 5 proceedings.

CONCLUSION

For the above and foregoing reasons, the Attorney General of the State of Mississippi respectfully requests that

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[3] The same conclusion is compelled by another principle of statutory construction, which recently was reaffirmed by the Supreme Court. It is that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 108 S. Ct. 1392 (1988). *See also NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501 (1979). The incorporation of the Section 2 "results" test into Section 5 raises serious constitutional problems. Under its present construction, Section 5 operates as an unparalleled but nonetheless limited restraint on voting changes in covered jurisdictions. The special treatment of covered jurisdictions under Section 5 is justified because of the specific and unique evil to which this remedy is directed. It was designed to prevent jurisdictions which discriminated from diminishing the position of racial minorities, not to coerce covered jurisdictions into changing their laws.

the Attorney General of the United States reconsider his objection to the repeal of Section 37-7-611, Mississippi Code of 1972, and that Section 47 of Chapter 492, 1986 Laws of 1986 be given preclearance in accordance with 42 U.S.C. § 1973c.

This the 12th day of January, 1990.

Respectfully submitted,

Mike Moore, Attorney General
State of Mississippi

Stephen J. Kirchmayr
Deputy Attorney General

By: /s/ Giles W. Bryant
Giles W. Bryant
Deputy Attorney General

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APPENDIX S

[SEAL]

U.S. Department of Justice
Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

MAY 25 1990

Honorable Mike Moore
Attorney General
State of Mississippi
P.O. Box 220
Jackson, Mississippi 39205-0220

Dear Mr. Attorney General:

This refers to your January 16, 1990, request for reconsideration of the March 31, 1989, objection interposed pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, to Section 47 of the Uniform School Law of 1986, Chapter 492, insofar as it repeals Section 37-7-611 of the Mississippi Code. As you are aware, Section 611 deals with the modification of municipal school district boundaries in Mississippi when the district's parent city annexes territory outside the school district, and generally provides that any such annexation will prompt a similar annexation by the municipal school district. Your request was supplemented on February 27, March 2, and March 13, 1990.

This also refers to your related submission under Section 5 of the Voting Rights Act of Chapter 379, H.B. No. 1159 (1977), which partially repealed the provisions of Section 611 by providing that they do not apply when a municipal school district's parent city adopts an annexation that

crosses county lines. We received your submission on March 26, 1990.

We have carefully considered the information you have provided, data from the 1970 and 1980 Censuses, and information and comments received from other interested parties. For the following reasons, it appears that the concerns set forth in the March 31, 1989, objection letter continue to weigh heavily in our review of the repeal of Section 611, and it also appears that these concerns apply with equal force to the 1977 partial repeal of the boundary extension provisions of Section 611.

At the outset, we note that the state makes several claims about the preclearance status of the instant changes which appear to seriously misconstrue the structure, purpose, and history of the preclearance requirement. The state contends that the repeal of Section 611 is not properly before the Attorney General for review because the repeal allegedly was precleared by operation of law when the state in 1986 submitted other portions of the Uniform School Law and no objection then was interposed to that submission within the 60-day review period. The state also contends that a 1978 amendment which clarified the scope of the instant 1977 change was precleared when the state in 1981 received preclearance for a separate portion of the 1978 statute.

It is well-established that to trigger Section 5 review a covered jurisdiction must submit a voting change to the Attorney General in an "unambiguous and recordable manner." *Allen* v. *State Board of Elections*, 393 U.S. 544, 571 (1969). *Accord, McCain* v. *Lybrand*, 465 U.S. 236 (1984); Procedures for the Administration of Section 5 (28 C.F.R. 51.26(d), 51.27). Both the prior submission of the Uniform School Law and the prior submission of the 1978 act identified specific voting changes adopted by those statutes, but neither submission contained any reference to the voting changes which the state now claims were precleared.

Section 5, as interpreted by the courts and our submission guidelines, plainly fixes the responsibility for identifying voting changes on the state, not the United States Attorney General, yet the state appears to be arguing in both instances that the Attorney General should have uncovered voting changes of which the state itself seemingly was unaware at the time the prior submissions were made. Accordingly, neither claim has any merit.

The principal factual argument advanced here by the state is that the changes in the procedure for extending municipal school district boundaries do not have any racial aspect but rather simply reflect an ongoing contest among school districts for students and tax base. In that regard, the state asks that we compare the 1970 and 1980 Census data for cities with municipal school districts to understand the current demographic trends in the state, and also points to some school district financial data from the 1984-1985 school year. In addition, the state claims that the question whether a municipal school district's boundaries should be extended is not relevant to whether the parent city should be allowed to adopt its proposed annexation, and thus the state's uncoupling of the two issues reflects a rational, nonracial decision.

However, our review of the census data and of specific recent annexation disputes in the state confirms our prior judgment that the repeal of Section 611 will essentially freeze municipal school districts in their present boundaries which, in many instances, apparently will yield municipal districts with increasingly higher black population percentages and neighboring school districts that are increasingly white. Among the school districts that would appear to be so affected is the Hattiesburg school district, where the issue of whether suburban whites will be annexed into the more heavily black municipal school district appears to have been the linchpin for the adoption of the 1977 change. Overall, while we continue to recognize that demographic patterns are not uniform throughout the state

and that some school district annexation disputes may only reflect the concerns noted by the state, there appear to be significant racial considerations involved in the instant changes which are generally understood among state political leaders and educators.

It also continues to appear that by repealing the boundary extension provisions of Section 611, the state would abandon the judicial, case-by-case approach to reviewing municipal annexations as they relate to school district boundaries, a process which the state supreme court recently confirmed fully allows for the consideration of any school district dispute involving legitimate educational concerns. *Harrison County* v. *City of Gulfport*, 557 So.2d 780 (Miss. S.Ct. 1990). We have received no nonracial explanation for reversing this longstanding practice.

Lastly, the state avers that the changes at issue relate to the administration of schools and do not deny or abridge the right to vote. Our analysis, however, indicates that the submitted changes involve the revision of political boundary lines based on race which, as indicated in our objection letter, is not permitted under Section 5. *Perkins* v. *Matthews*, 400 U.S. 379 (1971). Furthermore, as explained in that letter, the changes appear to establish a system for choosing municipal school district trustees that impacts negatively on the influence of minority city school district residents.

Under Section 5 of the Voting Rights Act, the submitting jurisdiction has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. See *Georgia* v. *United States*, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that the state's burden has been sustained in these instances. Accordingly, on behalf of the Attorney General, I must decline to withdraw

the objection to the repeal of Section 37-7-611 and must object to the change occasioned by Chapter 379 (1977).

As we advised in the March 31, 1989, objection letter, you have the right under Section 5 to seek a declaratory judgment from the United States District Court for the District of Columbia that the submitted changes have neither the purpose nor the effect of denying or abridging the right to vote on account of race or color. However, until these objections are withdrawn or a judgment from the District of Columbia Court is obtained, the repeal of Section 37-7-611 and the change occasioned by Chapter 379 (1977) continue to be legally unenforceable. Similarly, the unprecleared 1978 amendment to the 1977 change (adopted in Chapter 312 (1978)) is legally unenforceable. 28 C.F.R. 51.10.

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us of the course of action the State of Mississippi plans to take with respect to these matters. If you have any questions, please feel free to call Mark A. Posner (202-307-1388), an attorney in the Voting Section.

Sincerely,

/s/ John R. Dunne

John R. Dunne
Assistant Attorney General
Civil Rights Division

APPENDIX T

42 U.S.C. § 1973c

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or

procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

APPENDIX U

28 C.F.R. § 51.25 (1986)

§ 51.25 Required contents.

Each submission should contain the following information or documents to enable the Attorney General to make the required determination pursuant to Section 5 with respect to the submitted change affecting voting:

(a) A copy of any ordinance, enactment, order or regulation embodying a change affecting voting.

(b) If the change affecting voting is not readily apparent on the face of the document provided under paragraph (a) or is not embodied in a document, a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and proposed situation with respect to voting.

(c) The name, title, address, and telephone number of the person making the submission.

(d) The name of the submitting authority and the name of the jurisdiction responsible for the change, if different.

(e) If the submission is not from a State or county, the name of the county and State in which the submitting authority is located.

(f) Identification of the person or body responsible for making the change and the mode of decision (e.g., act of State legislature, ordinance of city council, administrative decision by registrar).

(g) A statement identifying the statutory or other authority under which the jurisdiction undertakes the change and a description of the procedures the jurisdiction was required to follow in deciding to undertake the change.

(h) The date of adoption of the change affecting voting.

(i) The date on which the change is to take effect.

(j) A statement that the change has not yet been enforced or administered, or an explanation of why such a statement cannot be made.

(k) Where the change will affect less than the entire jurisdiction, an explanation of the scope of the change.

(l) A statement of the reasons for the change.

(m) A statement of the anticipated effect of the change on members of racial or language minority groups.

(n) A statement identifying any past or pending litigation concerning the change or related voting practices.

(o) A statement that the prior practice has been precleared (with the date) or is not subject to the preclearance requirement and a statement that the procedure for the adoption of the change has been precleared (with the date) or is not subject to the preclearance requirement, or an explanation of why such statements cannot be made.

(p) Other information that the Attorney General determines is required for an evaluation of the purpose or effect of the change. Such information may include items listed in § 51.26 and is most likely to be needed with respect to redistricting, annexations, and other complex changes. In the interest of time such information should be furnished with the initial submission relating to voting changes of this type. When such information is required, but not provided, the Attorney General shall notify the submitting authority in the manner provided in § 51.35.

APPENDIX V

28 C.F.R. § 51.35 (1986)

§ 51.35 Obtaining information from the submitting authority.

(a) If a submission does not satisfy the requirements of § 51.25, the Attorney General shall request such further information as is necessary from the submitting authority and advise the submitting authority that the 60-day period will not commence until such information is received by the Department of Justice. The request shall be made as promptly as possible after receipt of the original inadequate submission and no later than the 60th day following its receipt.

(b) A copy of the request shall be sent to any party who has commented on the submission or has requested notice of the Attorney General's action thereon.

(c) If, after a request for further information is made pursuant to this section, the information requested becomes available to the Attorney General from a source other than the submitting authority, the Attorney General shall promptly notify the submitting authority, and the 60-day period will commence upon the date of such notification.

(d) Notice of the request for and receipt of further information will be given to interested parties registered under § 51.30.

APPENDIX W

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

JOHNNY DUPREE, JEFF R. BOWMAN, KATHRYN JONES AND CHARLOTTE TULLOS, Individually and in Their Official Capacities as Members of the Board of Trustees of the Hattiesburg Public School District	PLAINTIFFS
VS.	CIVIL ACTION, NO. H90-0043(W)
MIKE MOORE, Attorney General of Mississippi, in His Official Capacity, and the STATE OF MISSISSIPPI	DEFENDANTS
and	
THE LAMAR COUNTY BOARD OF EDUCATION and TRUSTEES, in Their Official Capacities, Charles L. Cameron, Rita Downs, Tommy Graham, Freddie G. Howell and Dr. Johnny R. Purvis	DEFENDANTS/ INTERVENORS
and	
FORREST COUNTY SCHOOL DISTRICT and the Members of the BOARD OF TRUSTEES Thereof in Their Official Capacities	DEFENDANTS/ INTERVENORS

JOINT MOTION FOR NEW TRIAL, OR TO ALTER OR AMEND ORDER

COME NOW the Defendants Mike Moore, Attorney General of Mississippi, in His Official Capacity and the State of Mississippi, Defendants/Intervenors The Lamar County Board of Education and Trustees, in Their Official Capacities, and Defendants/Intervenors Forrest County School District and Trustees, by and through their attorneys of record, and make this their Joint Motion for a New Trial pursuant to Rule 59(a) or Motion to Alter or Amend Order pursuant to Rule 59(e), on the grounds as follows:

1. The Court may open its Order if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions and direct the entry of a new judgment to address:

(1) The appropriate remedy, and the practical implications, given the holding that the repealer of Section 37-7-611 has not been precleared under Section 5 of the Voting Rights Act of 1964, when Section 52 of the Uniform School Law, codified as Section 37-7-183, Miss. Code Ann. (Supp. 1987), was held precleared.

(2) Whether under precedent, including *Dotson v. City of Indianola*, 514 F.Supp. 397 (N.D.Miss. 1981), *aff'd*, 455 U.S. 936 (1982), 739 F.2d 1022 (5th Cir. 1984), the appropriate remedy under Section 5 of the Voting Rights Act of 1964 is limited to a voting remedy, *i.e.*, the school districts' boundaries remain where they are and have been, but the persons annexed may not change their manner of voting. That is, the school districts would remain where they are, but the citizens annexed in Lamar

and Forrest counties would not be allowed to vote for the County School Boards.

(3) The propriety of enforcing state law as it pre-existed under 37-7-611 (unchanged since 1926 if the 1986 changes are deemed not precleared) considering the impact of *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984) precluding federal enforcement of state statutes.

(4) The failure of preclearing the 1966 Hattiesburg annexation creates a gap of contiguous annexation in violation of state law.

(5) The three-judge court found that "The state's submission failed to mention that pre-existing Mississippi law provided for automatic expansion of municipal school districts without requiring the consent of the school board governing the affected, annexed territory." (P. 19 of the Memorandum Opinion and Order on Remand from the Supreme Court of the United States, as issued August 27, 1993). This finding again raises the question of the affect of 28 C.F.R. Sections 51.25 and 51.35 (1986) which were in effect at the time.

(6) Although the three-judge court rejected the notion of repeal by implication, there remain questions of Mississippi statutory construction concerning the impact of precleared Section 37-7-103 over pre-existing 37-7-611, with the operation of state law.

(7) There then arise by necessity the issues concerning enforcement of the Mississippi Supreme Court decision in *Greenville Public School District, et al. v. Western Line Consolidated School District*, 575 So.2d 956 (Miss. 1990).

(8) Other issues as to standing of parties and ripeness of the issues are raised again in terms of whether, if boundary lines are changed for the Lamar County and Forrest County School Districts, those districts must move to intervene in "United States of America and Zandra Pittman, et al. v. The State of Mississippi, et al. and Hattiesburg Public School District", Civil Action, No. 4706 and/or whether Hattiesburg must join Lamar County as a necessary party under Rule 19.

Respectfully submitted,

MIKE MOORE, Attorney General of Mississippi, and THE STATE OF MISSISSIPPI, DEFENDANTS

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By: /s/ Giles W. Bryant

THE LAMAR COUNTY BOARD OF EDUCATION and TRUSTEES, IN THEIR OFFICIAL CAPACITIES, DEFENDANTS/ INTERVENORS

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FORREST COUNTY
SCHOOL DISTRICT and the
Members of the BOARD OF
TRUSTEES Thereof in Their
Official Capacities,
DEFENDANTS/
INTERVENORS

James H. C. Thomas, Jr.
206 West Front Street
Hattiesburg, MS 39401

By: /s/ James H.C. Thomas, Jr.

John L. Maxey, II
S. Mark Wann
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Begley
Suite 410, Heritage Building
401 East Capitol Street
P. O. Box 3977
Jackson, MS 39207-3977

By: /s/ John L. Maxey, II

NOTICE OF MOTION

Please take notice that Defendant and Defendants/ Intervenors will bring on for hearing their Joint Motion for New Trial, or to Alter or Amend Order before the Honorable Rhesa Barksdale, United States Circuit Judge, the Honorable Tom S. Lee, United States District Judge and the Honorable Henry T. Wingate, United States District Judge, United States District Courthouse, 245 East Capitol Street, Jackson, Mississippi, as soon as counsel can be heard.

Respectfully submitted,

/s/ Dennis L. Horn
DENNIS L. HORN

CERTIFICATE OF SERVICE

I, Dennis L. Horn, hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Joint Motion for New Trial, or to Alter or Amend Order to Hon. Perry Sansing, P. O. Drawer 119, Jackson, MS 39205.

This the 13th day of September, 1993.

/s/ Dennis L. Horn
DENNIS L. HORN

APPENDIX X

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

JOHNNY DUPREE, JEFF R. BOWMAN, KATHRYN JONES AND CHARLOTTE TULLOS, Individually and in Their Official Capacities as Members of the Board of Trustees of the Hattiesburg Public School District	PLAINTIFFS
VS.	CIVIL ACTION, NO. H90-0043(W)
MIKE MOORE, Attorney General of Mississippi, in His Official Capacity, and the STATE OF MISSISSIPPI	DEFENDANTS
and	
THE LAMAR COUNTY BOARD OF EDUCATION and TRUSTEES, in Their Official Capacities, Charles L. Cameron, Rita Downs, Tommy Graham, Freddie G. Howell and Dr. Johnny R. Purvis	DEFENDANTS/ INTERVENORS
and	
FORREST COUNTY SCHOOL DISTRICT and the Members of the BOARD OF TRUSTEES Thereof in Their Official Capacities	DEFENDANTS/ INTERVENORS

JOINT MOTION FOR REMEDY

COME NOW the Defendants Mike Moore, Attorney General of Mississippi, in His Official Capacity and the State of Mississippi, Defendants/Intervenors The Lamar County Board of Education and Trustees, in Their Official Capacities, and Defendants/Intervenors Forrest County School District and Trustees, by and through their attorneys of record, and make this their Joint Motion for Remedy, pursuant to, *inter alia*, F.R.Civ.P. Rule 56(d) on the grounds that this case has not been fully adjudicated on the Motions for Summary Judgment, as follows:

1. Judgment has not been rendered upon the whole case or for all the relief asked.

2. A trial is necessary for resolving the remaining issues which include (1) whether, if Section 5 of the Voting Rights Act of 1964 is limited to a voting remedy, there will be no de-annexation but a limitation over the vote as exercised by the persons annexed from Lamar County and Forrest County into the Hattiesburg School District, under *Dotson v. City of Indianola*, 514 F.Supp. 397 (N.D.Miss. 1981), *aff'd*, 455 U.S. 936 (1982), 739 F.2d 1022 (5th Cir. 1984) and (2) whether Section 52 of the Uniform School Laws of 1986, as codified at 37-7-103, Miss. Code Ann. (Supp. 1987), effective as precleared, which states that "with the consent of school board of the school district involved, the school board may add to such school district any part of the school district adjoining same," grants Lamar County and Forrest County the remedy they seek.

3. Under precedent, including *Dotson v. City of Indianola*, 514 F.Supp. 397 (N.D.Miss. 1981), *aff'd*, 455 U.S. 936

(1982), 739 F.2d 1022 (5th Cir. 1984), the appropriate remedy under Section 5 of the Voting Rights Act of 1964 is limited to a voting remedy, *i.e.*, the school districts' boundaries remain where they are and have been, but the persons annexed may not change their manner of voting. That is, the school districts would remain where they are, but the citizens annexed in Lamar County and Forrest County would not be allowed to vote for the County School Boards.

4. The propriety of enforcing state law as it pre-existed under 37-7-611 (unchanged since 1926 if the 1986 repealer is deemed not precleared) considering the impact of *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984) precluding federal injunctive enforcement of state statutes.

5. The failure of preclearing the 1966 Hattiesburg annexation creates a gap of contiguous annexation in violation of state law.

6. The three-judge court found that: "The state's submission failed to mention that pre-existing Mississippi law provided for automatic expansion of municipal school districts without requiring the consent of the school board governing the affected, annexed territory." (P. 19 of the Memorandum Opinion and Order on Remand from the Supreme Court of the United States, as issued August 27, 1993). This finding again raises the question of the effect of then existing regulations at 28 C.F.R. Sections 51.25 and 51.35 (1986).

7. Although the three-judge court rejected the notion of repeal or preclearance by implication, there remain questions of Mississippi statutory construction

concerning the impact of precleared Section 37-7-103 over preexisting 37-7-611 and the operation of state law.

8. There then arise by necessity the issue concerning enforcement of the Mississippi Supreme Court decision in *Greenville Public School District, et al. v. Western Line Consolidated School District*, 575 So.2d 956 (Miss. 1990).

9. Other issues as to standing of parties and ripeness of the issues are raised again in terms of whether, if boundary lines are changed for the Lamar County and Forrest County School Districts, they must move to intervene in "United States of America and Zandra Pittman, et al. v. The State of Mississippi, et al. and Hattiesburg Public School District". Civil Action, No. 4706 or whether Hattiesburg must join Lamar and Forrest Counties as necessary parties under Rule 19.

11. The Court at the hearing of this Motion should, by examining the pleadings in the evidence before it and by interrogating counsel, if practicable, ascertain what material facts exists without substantial controversy and what material facts are actually in good faith controverted, so that it shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the appropriate relief is not in controversy, and directing such further proceedings in the action which are just.

Respectfully submitted,

MIKE MOORE, Attorney General of Mississippi, and THE STATE OF MISSISSIPPI, DEFENDANTS

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Giles W. Bryant
Special Assistant Attorneys General
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Jackson, MS 39205
(601) 359-3692

By: /s/ Giles W. Bryant

THE LAMAR COUNTY BOARD OF EDUCATION and TRUSTEES, IN THEIR OFFICIAL CAPACITIES, DEFENDANTS/ INTERVENORS

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MSB #1605

By: /s/ Dennis L. Horn

FORREST COUNTY SCHOOL DISTRICT and the Members of the BOARD OF TRUSTEES Thereof in Their Official Capacities, DEFENDANTS/ INTERVENORS

James H. C. Thomas, Jr.
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By: /s/ James H.C. Thomas, Jr.

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By: /s/ John L. Maxey, II

NOTICE OF MOTION

Please take notice that Defendants and Defendants/ Intervenors will bring on for hearing their Joint Motion for Remedy before the Honorable Rhesa Barksdale, United States Circuit Judge, the Honorable Tom S. Lee, United States District Judge and the Honorable Henry T. Wingate, United States District Judge, United States District Courthouse, 245 East Capitol Street, Jackson, Mississippi, as soon as counsel can be heard.

Respectfully submitted,

/s/ Dennis L. Horn
DENNIS L. HORN

CERTIFICATE OF SERVICE

I, Dennis L. Horn, hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Joint Motion for Remedy to Hon. Perry Sansing, P. O. Drawer 119, Jackson, MS 39205.

This the 13th day of September, 1993.

/s/ Dennis L. Horn
DENNIS L. HORN

APPENDIX Y

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

JOHNNY DUPREE, *et al.* PLAINTIFFS

v. CIVIL ACTION NO. H90-0043(W)

MIKE MOORE, Attorney General of Mississippi, in His Official Capacity, and THE STATE OF MISSISSIPPI DEFENDANTS

and

THE LAMAR COUNTY BOARD OF EDUCATION and TRUSTEES, *et al.* DEFENDANTS/INTERVENORS

and

FORREST COUNTY SCHOOL DISTRICT, *et al.* DEFENDANTS/INTERVENORS

FORREST COUNTY SCHOOL DISTRICT'S SUPPLEMENT TO MOTION FOR REMEDY

COME NOW the Forrest County School District and members of its Board of Trustees, in their officials capacities, by and through their attorneys of record, and file this supplement to their motion for remedy, and in support thereof would show unto the Court as follows:

1. On September 13, 1993, the Defendant and Defendants/Intervenors in the above-referenced action filed a joint motion for remedy, asking the Court to adopt an appropriate, specific remedy in light of its memorandum opinion and order of August 27, 1993.

2. The Forrest County School District now supplements that motion to respectfully request that this Court order that any specific remedy adopted by it with regard to this matter will not go into effect until after the 1994-95 school year, the reasons for such a request being more specifically stated below.

3. According to state law, if a school district does not intend to renew the contract of an employee for a successive year, the school district is required to give written notice to the employee of that fact by a certain date. *Mississippi Code Ann.* § 37-9-105, which contains this provision, is quoted in full as follows:

> In the event that a determination is made by a school district not to offer an employee a renewal contract for a successive year, written notice of nonrenewal shall be given within seven (7) days of the date when the recommendation to reemploy would have been made under the provisions of sections 37-9-156 and 37-9-17, and amendments thereto, but in any event no later than the following:
>
> (a) If the employee is a superintendent, the school district shall give notice of nonreemployment on or before February 1;
>
> (b) If the employee is a principal, the school district shall give notice of nonreemployment on or before March 1;
>
> *(c) If the employee is a teacher or other professional educator, the school district shall give notice of nonreemployment on or before April 8.*

(Emphasis added).

4. Because of this litigation, the Forrest County School District is particularly concerned regarding its obligation under state law to notify by April 8, 1994, any teachers whose contracts will not be renewed for the 1994-95 school year. If the areas of the Forrest County School District which were previously annexed by Hattiesburg are transferred to the Hattiesburg Public School District, obviously many of the Forrest County School District's teachers' contracts will not be renewed. Likewise, if the Forrest County School District renews teachers' contracts based on the current boundaries of the Forrest County School District, and then learns that much of that district will be transferred to the Hattiesburg Public School before the 1994-95 school year, then it will be obligated to pay salaries for a significant number of teachers whose services will not be required.

5. Further creating confusion are recent suggestions by Hattiesburg Public School District officials that, should the boundaries be moved before the 1994-95 school year, the Hattiesburg Public School District will not automatically hire all teachers currently working for the Forrest County School District in those affected areas.

6. It appears unlikely that all matters relating to this litigation, as well as matters filed in the Hattiesburg desegregation case (*United States v. Zandra Pittman*, Cause No. 4706), will be resolved in time to give notice to teachers before April 8, 1994.

7. For these reasons, the Forrest County School District respectfully requests that, as a matter of necessity and equitable considerations, this Honorable Court order that any remedy which it imposes in this matter will not

go into effect until after the 1994-95 school year. Such an Order would give all school districts effected ample time to make necessary changes and inform their employees of their status with adequate notice under state law.

WHEREFORE, PREMISES CONSIDERED, the Forrest County School District and members of its board of trustees, in their official capacities, respectfully request that its supplemental motion be granted.

Respectfully submitted,

FORREST COUNTY SCHOOL DISTRICT
and the Members of the BOARD OF
TRUSTEES Thereof in Their
Official Capacities

James H. C. Thomas, Jr., Esquire
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Hattiesburg, Mississippi 39401

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THEIR ATTORNEYS

By: /s/ S. Mark Wann
S. MARK WANN

CERTIFICATE OF SERVICE

I, S. Mark Wann, do hereby certify that I have this day mailed by United States mail, postage fully prepaid, a true and correct copy of the above Forrest County

School District's Supplement to Motion for Remedy to the following counsel of record:

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COUNSEL FOR DEFENDANT-INTERVENOR

THIS the 11th day of February , 1993 [sic].

/s/ S. Mark Wann
S. MARK WANN

No. 94-66 and No. 94-82

Supreme Court, U.S.
FILED
AUG 3 1994
THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MIKE MOORE, *et al.*,

Appellants,

vs.

JOHNNY DUPREE, *et al.*,

Appellees.

THE LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, *et al.*,

Appellants,

vs.

JOHNNY DUPREE, *et al.*,

Appellees.

On Appeal From
The United States District Court
For The Southern District of Mississippi

MOTION TO AFFIRM

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Counsel for Appellees

August 3, 1994

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

BEST AVAILABLE COPY

QUESTIONS PRESENTED

Whether the District Court properly applied Clark vs. Roemer, 500 U.S. 646 (1991), in holding that the Attorney General did not preclear under § 5 of the Voting Rights Act a voting change that the State of Mississippi failed to identify with specificity in its submission of other voting changes.

Whether the District Court properly exercised its remedial powers in a § 5 action by enjoining the enforcement of an unprecleared law until the State complied with the Voting Rights Act.

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No. 94-66 No. 94-82

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

MIKE MOORE, et al.,

Appellants,

vs.

JOHNNY DUPREE, et al.,

Appellees.

LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, et al.,

Appellants,

vs.

JOHNNY DUPREE, et al.,

Appellees.

MOTION TO AFFIRM

Pursuant to Rule 18.6, the Appellees move to affirm the order of the District Court because the questions are so insubstantial that further argument is unnecessary. The

District Court's decision is based on well-established precedent and presents no conflict or issue of statutory interpretation that requires resolution by the Court.

STATEMENT OF THE FACTS

Since 1926, Mississippi law has required that the boundaries of a city school district be, at a minimum, coterminous with its parent city. Thus, the residents of the city were always residents of the city school district. These residents elect the city council, which in turn appoints the members of the school board for the city school district. The State of Mississippi attempted to change this policy in 1986 by repealing Miss. Code Ann. § 37-7-611, which provides that when a city annexes territory the boundaries of the city school district automatically expand to encompass the territory annexed by its parent city.[1]

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[1] In 1977 and 1978, the State of Mississippi attempted to create an exception to § 37-7-611 by amending Miss. Code Ann. § 21-1-59. These amendments provided that extension by annexation of a city's boundaries across a county line would not affect the boundaries of the adjacent county school district unless the county school district consented to allow the annexed area to be included in the city school district. J.S. App. 5a-6a.

In 1991, the District Court granted summary judgment in favor of the Appellees on their claim that the 1977 and 1978 amendments to § 21-1-59 are not enforceable because they were never precleared by the Attorney General. Dupree vs. Mabus, 776 F. Supp. 290, 303-04 (S.D. Miss. 1991) (Dupree I), vacated and remanded on other grounds sub. nom, Dupree vs. Moore, ___ U.S. ___, 117 L.Ed. 2d 609 (1992). No cross-appeal of this portion of the District

As a result of the repeal of § 37-7-611, the residents of an area annexed by the city would not necessarily be residents of the city school district; they could remain residents of the county, or suburban, school district. This fundamental alteration of the long standing policy in Mississippi created the anomaly of the newly annexed residents continuing to elect directly the board members of their county, or suburban, school district, while indirectly selecting the board members of the city school district by participating in city council elections.

The repeal of § 37-7-611, as well as the amendments to § 21-1-59, limited the expansion of the Hattiesburg School District when its parent city expanded by annexation into neighboring Lamar County in 1979, 1981, 1982, 1985 and 1989 and into Forrest County, where the City of Hattiesburg is primarily located, in 1989. Because of these laws, the Hattiesburg School District did not expand to include the suburban property annexed by the City.

The State of Mississippi enforced these laws despite not gaining preclearance as required by the Voting Rights Act. In February 1990, the Appellees, individually as residents and registered voters of the City of Hattiesburg and in their official capacities as members of the school board of the Hattiesburg School District, filed this action under § 5 of the Voting Rights Act against the State of Mississippi. The

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Court's judgment in Dupree I was filed. As the Appellants now concede, no issue related to the enforceability of the amendments to § 21-1-59 is before the Court. No. 94-66 J.S. p.9 n.7

Appellees sought declaratory and injunctive relief to halt enforcement of the laws.[2]

In its first opinion in this litigation, the District Court held that the repealer of § 37-7-611 had been properly submitted to and precleared by the Attorney General in 1986. Dupree vs. Mabus, 776 F. Supp. 290, 303 (S.D. Miss. 1991) (Dupree I), vacated and remanded sub. nom, Dupree vs. Moore, ___ U.S. ___, 117 L. Ed. 2d 609 (1992). The Court vacated Dupree I and remanded for reconsideration in light of Clark vs. Roemer, 500 U.S. 646 (1991).

On remand, the District Court held that, when measured by the principles outlined in Clark, the repealer of § 37-7-611 had not been precleared. The State did not specifically identify the voting change effected by the repealer in its 1986 submission of other voting changes. Dupree vs. Moore, 831 F. Supp. 1310, 1317 (S.D. Miss. 1993) (Dupree II), appeal dismissed, ___ U.S. ___, 127 L.Ed 2d 69 (1994).

After the District Court issued Dupree II, the Appellants filed joint motions under Fed. R. Civ. P. 59 to alter or amend, for a new trial and for a remedy, and under Fed. R. Civ. P. 62 for a stay pending appeal. Before the District Court ruled on these motions, the Appellants filed an appeal to this Court. The District Court denied the Rule 62 motion on October 29, 1993, and withheld ruling on the

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[2] After the three-judge court convened, the Lamar County and Forrest County school districts and their school boards intervened as Defendants. In both school districts, board members are elected directly by the residents of the county school district. Miss. Code Ann. §§ 37-5-1, -3.

Rule 59 motions pending resolution of the appeal. The Court dismissed the appeal for lack of jurisdiction on January 18, 1994, and the District Court denied the Rule 59 motions on April 13, 1994. J.S. App. 1a, 77a.

The focus of this appeal--the status of the repealer of § 37-7-611--requires a review of the submission histories of the Uniform School Law and the repealer of § 37-7-611. In 1986, the Mississippi Legislature passed the Uniform School Law, a sweeping act affecting a wide range of topics. This Law consisted of 203 sections and repealed, enacted or amended more than 300 separate statutes. Section 47 of the Uniform School Law repealed § 37-7-611 and twenty-two other statutes that dealt with "the creation and operation of municipal separate school districts." J.S. App. 121a.

Section 52 of the Uniform School Law amended Miss. Code Ann. § 37-7-103. Prior to 1986, § 37-7-103 permitted a county board of education to abolish the boundaries of any school district in the county except a city school district. With the consent of the city school district, the county board of education could add to the city school district any part of the county adjoining the city school district or detach territory from the city school district and merge it into the county school system. Section 37-7-103 now provides that any school district has authority to alter its boundaries by agreement with an adjoining district. J.S. App. 122a-123a.

The State submitted the Uniform School Law to the Attorney General for preclearance on July 22, 1986. J.S. App. 78a. The submission consisted of a one-page cover letter, a thirteen-page document containing information arranged in accordance with the Department of Justice regulations governing § 5 submissions and a 467-page

looseleaf booklet titled "Senate Bill 2117 - Comparison of Current Law and New Law," which contained the typed version of the bill interspersed with photocopied pages of the then-current statute amended by particular sections of the Uniform School Law. J.S. App. 93a-152a.[3]

In 1986, § 51.25(a) of the regulations governing § 5 submissions to the Attorney General required that a copy of the enactment embodying the voting change be provided. J.S. App. 224a. In addition, § 51.25(b) stated that if the voting change was not "readily apparent on the face of the document provided under" § 51.25(a), the submission must contain "a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and

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[3] The one-paragraph "Introductory Note" to the looseleaf booklet states that it provides "on a section by section basis each section of the current law which has been amended followed by each individual section of" the Uniform School Law. Thus, the State did not attempt to provide the Attorney General with a comparison of the prior law with the proposed law if the prior law was repealed. The Note also indicates that if a section of the Law creates "new law then only those particular sections will be denoted with no comparison of current law." The Note further stated that "[t]his section by section comparison provides explanatory materials adequate to disclose the difference between the prior and the proposed law." The Note concludes as follows: "By comparing each section of [the Uniform School Law] and the current practice, the changes to current law are easily identified." By the State's own admission, however, these comparisons were made only for statutes amended by the Law. J.S. App. 93a.

proposed situation with respect to voting." J.S. App. 224a. The regulations did not require the submitting jurisdiction to provide a copy of the prior law being repealed or amended.

The State characterized its submission as follows:

> This submission is cited as the "Mississippi Uniform School Law of 1986" and is submitted to the Attorney General of the United States in its entirety. For the sake of brevity, the submission will only set forth the particular sections which deal primarily with voting rights even though the complete act is submitted for review. [J.S. App. 81a.]

The State specifically identified thirteen of the 203 sections of the Uniform School Law. J.S. App. 81a-87a. Section 47, which repealed § 37-7-611, was neither identified nor referred to anywhere in the thirteen-page submission. The brief text of § 47 does appear, without explanatory comment by the State, in a copy of the Uniform School Law and the looseleaf booklet supplied to the Attorney General. J.S. App. 121a. Section 52, which amended § 37-7-103, was one of the thirteen sections specifically identified and discussed in the submission. J.S. App. 83a.

The discussion of § 52 in the State's submission consisted of a paraphrase of the then-current statute and the amended version but made no mention of § 47 or § 37-7-611. The analysis of § 52 did not refer in any way to the State's longstanding policy, reflected in § 37-7-611, of automatically extending a city school district's boundaries after an annexation by its parent city. The State did not say, or even suggest, that § 52 was designed to replace the policy reflected in § 37-7-611.

The Attorney General responded to the State's submission on August 29, 1986. He did "not interpose any objection to the voting changes occasioned by [the Uniform School Law], as identified in your July 22, 1986, letter." J.S. App. 156a (emphasis added). The voting change effected by the repeal of § 37-7-611 was not specifically identified in the submission and was not precleared. The State acknowledged that the status of § 37-7-611 remained unclear after the Attorney General's response, J.S. App. 191a, and conceded in the District Court that the State's July 1986 submission contributed to the uncertainty. Memorandum in Support of State Defendants' Motion to Dismiss, p.8.

In formal recognition of the absence of preclearance, the State submitted § 47 to the Attorney General on December 30, 1987. J.S. App. 158a. In its submission of § 47, the State acknowledged that the entire Uniform School Law was not precleared by the Attorney General. See, e.g. J.S. App. 161a ("The major part of [the Uniform School Law], as it deals with the Voting Rights Act . . . has already been precleared."); J.S. App. 164a ("[M]ost of" the Uniform School Law has "already been precleared by the "Justice Department.); J.S. App. 164a ("[S]ubstantive parts of" the Uniform School Law were "precleared by the Justice Department.").

On January 27, 1989, the State responded to the Attorney General's request for additional information concerning the repeal of § 37-7-611. The State again acknowledged that the Uniform School Law had not been precleared in its entirety in 1986. Moreover, the State expressly represented that § 47 had not been specifically identified in the earlier submission of the Uniform School Law:

> On July 22, 1986, the State of Mississippi submitted [the Uniform School Law] for preclearance under Section 5 of the Voting Rights Act. On August 29, 1986, [the Uniform School Law] was precleared under Section 5 as to the particular sections identified in our July 22, 1986 submission.
>
> On December 30, 1987, the State of Mississippi submitted [the repealer of § 37-7-611] since [it] was not specifically identified in our original submission. [J.S. App. 174a (emphasis added).]

The Attorney General interposed an objection to the repeal of § 37-7-611 on March 31, 1989.[4]

On January 12, 1990, the State sought reconsideration of the Attorney General's limited preclearance of the Uniform School Law or, alternatively, the objection interposed to the repeal of § 37-7-611. J.S. App. 187a. The State contended for the first time that the entire Uniform School Law had been submitted and precleared in 1986. J.S. App. 189a-193a. On May 25, 1990, the Attorney

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[4] The Attorney General concluded the repeal of § 37-7-611 would likely "create a class of city voters (for the most part predominantly white) who will not reside in the city school system yet may vote for the city governing body which, under Mississippi law, appoints the city school board." The State did not provide a rationale for the creation "of such a political system which appears not only to have the potential to impact negatively on the influence of minority city school district residents but also to treat black voters differently than white voters." J.S. App. 183a.

General rejected the State's position because it "appear[ed] to seriously misconstrue the structure, purpose, and history of the preclearance requirement." J.S. App. 218a. Section 5 "plainly fixes the responsibility for identifying voting changes on the state, not the . . . Attorney General. [Y]et the state appears to be arguing . . . that the Attorney General should have uncovered voting changes of which the state itself seemingly was unaware at the time the prior submissions were made." J.S. App. 219a.

In Dupree I, the District Court concluded the 1986 repealer of § 37-7-611 had been adequately identified in the State's submission of the Uniform School Law and, therefore, precleared by the Attorney General when he did not interpose an objection within 60 days. J.S. App. 63a-71a. The Appellees in this appeal filed an appeal of that portion of the District Court's judgment in Dupree I. The Court vacated and remanded Dupree I in light of its decision in Clark vs. Roemer, 500 U.S. 646 (1991), which emphasized a state's obligation to identify with specificity each voting change for which it seeks preclearance. On remand, the District Court ruled in Dupree II that

> Mississippi's 1986 submission is precisely that circumstance condemned by Clark vs. Roemer. Should this court permit Mississippi to submit a haystack of documents and obligate the Attorney General to painstakingly search for any voting change needle, as Mississippi has done here, this court would be ignoring Clark's clear pronouncement that a State must "identify with specificity each change that it wishes the Attorney General to consider" in a § 5 submission.

J.S. App. 22a. As a result, the District Court held the repealer of § 37-7-611 to be ineffective and unenforceable until Mississippi obtains administrative or judicial preclearance. J.S. App. 22a-23a, 36a-37a.

ARGUMENT

A. The District Court's interpretation of § 5 of the Voting Rights Act is consistent with decisions of the Court and the objectives of the Act.

The District Court's decision in Dupree II is a straightforward application of Clark vs. Roemer. The District Court's holding that the State failed to identify with specificity the voting change for which it sought preclearance does not depart from the Court's precedent or create a conflict with a decision from another circuit. The decision does not undermine the process for administrative preclearance because the Justice Department's position prevailed in the District Court. The District Court's decision in Dupree II is so obviously correct that it should be summarily affirmed.

The argument advanced by the Appellants and the dissenting judge in Dupree II would significantly reduce the responsibility of jurisdictions covered by the Voting Rights Act to identify clearly the voting changes submitted to the Attorney General for preclearance. The relaxation of that burden on submitting jurisdictions would "subvert the efficacy of administrative preclearance under § 5." Clark vs. Roemer, 500 U.S. at 655. Ultimately, the purpose envisioned by Congress for administrative preclearance -- providing states with an expeditious method of having nondiscriminatory voting laws implemented without undue delay -- would be disserved.

Since Allen vs. State Bd. of Elections, 393 U.S. 544 (1969), the Court has interpreted the Voting Rights Act to require that a state submit its voting changes to the Attorney General in an "unambiguous and recordable manner." Id. at 571; see United States vs. Board of Comm'rs, 435 U.S. 110, 136 (1978) ("the purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him"). The regulations governing § 5 submissions have always contained a similar requirement. City of Rome vs. United States, 446 U.S. 156, 169 n.6 (1980).

In McCain vs. Lybrand, 465 U.S. 236 (1984), the Court provided direction on this issue, and the principles articulated in that decision were reaffirmed in Clark vs. Roemer.

> We made clear [in McCain] that the submission of legislation for administrative preclearance under § 5 defines the scope of the preclearance request. Under normal circumstances, a submission pertains only to identified changes in that legislation. We established also that any ambiguity in the scope of a preclearance request must be resolved against the submitting authority.

500 U.S. at 656 (citations omitted). In reversing the district court's holding that the Attorney General's preclearance of certain identified voting changes constituted preclearance of other related but unidentified voting changes, the Court in Clark reiterated the importance of specificity in the state's submission: The state "must identify with specificity each change that it wishes the Attorney General to consider." Id.

at 658. The Court also reaffirmed the presumption established in McCain that the Attorney General will review only the voting changes specifically described in the state's submission. Id. at 657.

In light of Clark, the District Court in Dupree II correctly held that the State did not properly submit the repealer of § 37-7-611 to the Attorney General in 1986 when it submitted other voting changes. The submission of the Uniform School Law in 1986 did not contain an explanation of the process by which city school district boundaries automatically expand to encompass territory in an adjacent school district after an annexation by its parent city. Nor did the 1986 submission indicate that this process was repealed by § 47 of the Uniform School Law. Moreover, the submission is utterly silent about any voting change effected by the repeal of § 37-7-611.

The Appellants contend the discussion of § 37-7-103 in § 52 of the State's submission put the Attorney General on notice that this statute was designed to replace the automatic extension policy of § 37-7-611 and serve as the sole method of altering school district boundaries. The State, however, did not identify the amendment of § 37-7-103 in this manner in the submission. The discussion of amended § 37-7-103 reveals only that any school district could voluntarily agree with any other school district to a revision of the boundaries of the districts. J.S. App. 83a. Thus, the Appellants' position is contrary to Clark: "A request for preclearance of certain identified changes in election practices which fails to identify other practices as new ones thus cannot be considered an adequate submission of the latter practices." 500 U.S. at 658 (quoting McCain).

The Appellants also point to the statements that the Uniform School Law was submitted "in its entirety" and that "the complete act is submitted for review." The use of these phrases, they argue, made the submission unambiguous. These phases do not identify any voting change, much less suggest that the State intended § 37-7-103 to replace § 37-7-611. As the Solicitor General noted in the appeal of Dupree I, it is doubtful the State "intended to submit the Uniform School Law 'in its entirety,' since most of its 203 sections have nothing to do with voting." Br. p.17 n.13. A clear statement that voluminous legislation is submitted "in its entirety" does not satisfy Clark's requirement that a state clearly identify each voting change in its submission.

The Appellants contend that the bare citation in the looseleaf booklet of § 37-7-611 and twenty-two other statutes dealing with the creation and operation of city school districts suffices for a proper submission of the voting change effected by the repeal of § 37-7-611. In other words, the Appellants suggest that, although the State did not identify or explain the automatic extension policy in § 47 or elsewhere in the submission, the Attorney General should have understood that the State intended to change this policy by including § 37-7-611 in a list of repealed statutes in § 47. Their argument is plausible only if the Attorney General was duty bound to retrieve, review and study the more than 100 statutes, including § 37-7-611, listed, without elaboration, as having been repealed in the 1986 submission.

The Court in Clark vs. Roemer expressly rejected the view of § 5 pressed by the Appellants and the dissent below. A state's obligation to identify with specificity each voting change is not a favor bestowed on the Attorney General. Noting the thousands of voting changes reviewed annually by the Attorney General, Clark requires that before a state's

voting change can be enforced, the state must "identify, submit, and receive approval for" the change. 500 U.S. at 658. Requiring the Attorney General to conduct independent research to determine whether a submission contained unidentified voting changes "would add to the Attorney General's already redoubtable obligations." Id.

Today, virtually all voting changes are submitted to the Attorney General for preclearance because of the cost and time constraints in litigating in the District of Columbia District Court. By allowing for administrative preclearance, however, "Congress in no way intended that the substantive protections of § 5 be sacrificed in the name of expediency." McCain, 465 U.S. at 246. Under either method of preclearance, the covered jurisdiction bears the burden of proving that the change in voting does not have a discriminatory purpose or effect, and in both instances "federal officials are confronted with the same 'difficult substantive issue.'" Id. at 247 (quoting Allen, 393 U.S. at 558). In the light of the reliance on administrative preclearance, Clark emphasized the necessity that the State identify each change so the Attorney General can perform her duties under § 5. 500 U.S. at 658.

The Appellants' position would permit a state to claim that the submission of an act is complete and unambiguous, even without specifically identifying each voting change sought to be reviewed, as long as the State includes the catch-all phrase "the complete act is submitted for review." In response, the Attorney General would likely interpose an objection rather than risk approving a discriminatory voting change not identified in the submission but otherwise a part of the "complete act" submitted for review. This response, however, might well delay "the implementation of validly enacted, nondiscriminatory state

legislation," a primary objective of administrative preclearance. See Morris vs. Gressette, 432 U.S. 491, 503 (1977).[5] Although such a response by the Attorney General would be the most prudent exercise of his responsibilities, it "would only add acrimony to the administration of § 5." Georgia vs. United States, 411 U.S. 526, 540-41 (1973).

In the context of judicial preclearance, a covered jurisdiction could not argue that the District of Columbia District Court approved a voting change that was not identified in the complaint or litigated at trial. To hold a state to a less demanding standard in seeking administrative preclearance would render the declaratory judgment route superfluous. Cf. id. at 538 ("Any less stringent standard [for the burden of proof] might well have rendered the formal declaratory judgment procedure a dead letter by making available to covered States a far smoother path to clearance.").

The Appellants also construct an argument on the regulation (§ 51.35) in effect in 1986 that required the Attorney General to request additional information if he considered the State's July 1986 submission to be incomplete. J.S. App. 226a. The Appellants' position is wrong for two reasons. First, the Appellants presume the Attorney General considered the State's submission to present the entire Uniform School Law for approval. To the contrary, it is clear the Attorney General considered only the thirteen specifically identified voting changes to be before

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[5] The Appellants' reliance on Morris is misplaced. The issue presented in this appeal--whether a voting change was properly submitted to the Attorney General--was not present in Morris. The submission in Morris was complete and unambiguous. 432 U.S. at 502, 504 & n.19.

him for review. This view of the submission is confirmed by the Attorney General's August 29, 1986 response in which he referred to the "voting changes . . . identified" in the State's submission. J.S. App. 156a.

Second, the Appellants' reliance on the lack of a request for additional information reflects a flawed perception of the purpose of the regulation, which allows the 60-day period for action to be suspended by a request for additional information. "The judgment that the Attorney General must make is a difficult and complex one, and no one would argue that it should be made without adequate information." Georgia vs. United States, 411 U.S. at 540. The regulation enables the Attorney General to make an informed decision by requesting additional information relevant to the changes identified in the initial submission. The regulation is not a mechanism for the Attorney General to ferret out other potential voting changes a state neglects to identify. A state knows better than anyone what it wishes precleared and the burden of uncovering voting changes in a submission should not be, as the Appellants suggest, the responsibility of the Attorney General.

B. The remedy imposed by the District Court for the violation of § 5 is consistent with the Court's precedent and the purposes of the Voting Rights Act.

The Appellants contend the District Court failed to issue a "specific, equitable" and "appropriate" remedy. No. 94-66 J.S. p.26; No. 94-82 J.S. p.12. The District Court enjoined the enforcement of the repealer of § 37-7-611 until the State complies with the preclearance requirements of the Voting Rights Act. J.S. App. 22a-23a, 36a-37a. This remedy is entirely consistent with the remedy either affirmed or mandated by the Court in prior § 5 cases, including Clark

vs. Roemer, which stated: "If voting changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes." 500 U.S. at 652-53; see, e.g., Dougherty County Bd. of Educ. vs. White, 439 U.S. 32, 36 (1978); Berry vs. Doles, 438 U.S. 190, 191 (1978) (per curiam); Georgia vs. United States, 411 U.S. at 541; Perkins vs. Matthews, 400 U.S. 379, 397 (1971); Allen vs. State Bd. of Elections, 393 U.S. at 572.[6]

The Appellants argue that McCain vs. Lybrand "emphasized the [District Court's] duty to adopt voting remedies by making . . . suggestions" such as the Court did in that case. No. 94-66 J.S. p.28. They misread McCain. The portion of McCain cited by the Appellants relates to an identification of voting changes effected by a state statute, not proposed remedies available to the district court. 465 U.S. at 250 n.17. The parties in McCain stipulated that submission of the voting changes was required; thus, "the parties understandably have made little effort to define precisely the nature of the changes in elections practices made by the [state statute] which required preclearance." Id. Noting that the parties agreed on one particular change, the

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[6] The "confusion", "chao[s]" and "doubt" purportedly created by the remedy in Dupree II is more imagined than real. See No. 94-66 J.S. pp.26, 29; No. 94-82 J.S. p.12. The Plaintiffs (Appellees here) did not request the District Court to modify school district boundary lines. That issue, as Forrest County and the State acknowledge, is presently before the court that oversees the Hattiesburg School District's desegregation order. See No. 94-66 J.S. p.29 n.10. The Appellants are parties to that desegregation case and each has filed pleadings opposing any modification of school district boundaries.

Court "suggested" several other voting changes made by the state statute. Id.; see id. at 239-40 (explaining the voting practices in existence prior to enactment of the statute under review). These changes were not, as the Appellants contend, "suggestions" for the district court to consider or implement on remand as part of a remedy. Instead, they were changes made by the state to its voting laws.

Clark vs. Roemer reaffirmed that the "local district court is in a better position than this Court to fashion relief, because the district court is more familiar with the nuances of the local situation." 500 U.S. at 659. (quotations omitted). In granting relief, the district court "should adopt a remedy that in all the circumstances of the case implements the mandate of § 5 in the most equitable and practicable manner and with least offense to its provisions." Id. at 660. The Appellants raised on several occasions in the District Court the same arguments pressed now on appeal. The District Court concluded that "the most equitable and practicable" remedy was to enjoin the repealer of § 37-7-611 until the State complies with § 5.

The remedy proposed by the Appellants in the District Court called for school district boundaries to remain unaffected by Dupree II and to preclude the newly annexed residents of the City of Hattiesburg from voting in county school board elections. This suggested remedy is neither equitable nor practicable. It deprives voters in the county school district of the right to vote for county school board members who have the power, among others, to determine the amount of taxes imposed on residents of the county school district. See Miss. Code Ann. § 37-57-105 (procedure for raising revenue from property taxes imposed on residents of school district). In addition, the Appellants' proposed remedy does not overcome the objection made by

the Attorney General to the repealer of § 37-7-611. The residents of the county school district would still indirectly select city school board members by participating in city elections. J.S. 185a.

In attacking the District Court's remedy, the Appellants emphasize the Mississippi Supreme Court's decision in Greenville Public School Dist. vs. Western Line Public School Dist., 575 So. 2d 956 (Miss. 1990), cert. denied, ___ U.S. ___, 117 L. Ed. 2d 649 (1991), which held that, even if the repealer of § 37-7-611 was not precleared, the amendment to § 37-7-103 repealed § 37-7-611 by implication under state rules of statutory construction. The Appellants contend the District Court in Dupree II should have deferred to the state supreme court's holding, No. 94-82 J.S. pp. 16-18, and "recognized that § 37-7-103 must supersede § 37-7-611," No. 94-66 J.S. p.25.

The District Court correctly rejected this contention, holding that "even if Section 52 in effect amounted to a repeal of § 37-7-611 by operation of state law, that fact was not submitted to the Attorney General in 1986 nor reviewed by him as such." J.S. App. 21a n.10. If the State of Mississippi desires to repeal § 37-7-611 and, as a result, effect a change in its voting laws, the preclearance requirements of § 5 must be satisfied, regardless whether the repeal arises from legislative action or by judicial decree. See Hathorn vs. Lovorn, 457 U.S. 255, 269 n.23 (1982); McDaniel vs. Sanchez, 452 U.S. 130, 153 (1981). The State's discussion of the amendment to § 37-7-103 did not identify any attendant change in the State's policy regarding the effect on school district boundaries after an annexation. Therefore, the Attorney General did not preclear the amendment to § 37-7-103 as a replacement for § 37-7-611.

In summary, Dupree II correctly applied Clark vs. Roemer and prohibited the State from enforcing the repealer of § 37-7-611 until the State receives either administrative or judicial preclearance. Dupree II upheld the Attorney General's objection because the State did not specifically identify the voting change effected by the repealer in the 1986 submission of the Uniform School Law. The District Court's decision is correct and further argument is unnecessary.[7]

CONCLUSION

For these reasons, the District Court's decision should be summarily affirmed.

RESPECTFULLY SUBMITTED,

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[7] The Appellants raise several questions concerning standing and the proper scope and application of § 5. No. 94-82 J.S. pp.10-16, 19-20. Dupree I decided these questions against the Appellants and no appeal was taken. Moreover, the District Court's resolution of these issues does not present a substantial question.

(3) (3)

No. 94-66 and No. 94-82

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MIKE MOORE, *et al.*,

Appellants,

vs.

JOHNNY DUPREE, *et al.*,

Appellees.

THE LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, *et al.*,

Appellants,

vs.

JOHNNY DUPREE, *et al.*,

Appellees.

On Appeal From
The United States District Court
For The Southern District Of Mississippi

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO AFFIRM

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No. 94-66 No. 94-82

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

MIKE MOORE, et al.,

Appellants,

vs.

JOHNNY DUPREE, et al.,

Appellees.

LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, et al.,

Appellants,

vs.

JOHNNY DUPREE, et al.,

Appellees.

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO AFFIRM

I. Introduction

The purpose of this supplemental brief is to bring to the Court's attention the role of the United States in this case. The United States' consistent position throughout this litigation has been that the State of Mississippi did not comply with § 5 of the Voting Rights Act when it failed to identify with specificity the voting change in issue in a submission of other voting changes in 1986. The Solicitor General reaffirmed this position in his February 1992 brief as amicus curiae during the initial appeal of this case to the Court. Therefore, Appellees respectfully suggest that it is unnecessary for the Court to invite the Solicitor General to express the views of the United States on this case.

The suggestion to dispense with an invitation to the Solicitor General is not made out of fear that the United States' position has changed since 1992. Rather, it is based on our belief that, because of the nature of the issue presented, the United States' position has not changed and a reiteration of that position will not significantly aid the Court's decision-making process. The central issue on appeal concerns administrative preclearance under § 5. The District Court held that the State's 1986 submission failed to satisfy the standards outlined in Clark vs. Roemer, 500 U.S. 546 (1991), and earlier cases. These standards require that a jurisdiction identify with specificity each voting change for which its seeks administrative preclearance. In his 1992 brief, the Solicitor General stated that Clark removed any doubt that the State's 1986 submission failed to comply with § 5.

This litigation, which is entering its fifth year, applies not just to the operation of the three school districts that are

parties but also to every city and county school district in Mississippi affected by any municipal annexation. In light of the importance of this case to Mississippi public school districts and because the position of the United States has already been expressed, we respectfully suggest that the District Court's decision be summarily affirmed without inviting the Solicitor General to express again the views of the United States on this case.

II. The United States has Consistently Maintained that the State of Mississippi Failed to Submit Properly the Repealer of § 37-7-611 in 1986.

In March 1991, one year after the Appellees filed this action, the United States moved to participate as amicus curiae in support of the Appellees' position. J.S. App. 47a n.2. The United States argued that the State failed to receive preclearance of the repealer of § 37-7-611. Id. In Dupree I, the District Court rejected the position of the Appellees and the United States. J.S. App. 45a.

On appeal, the Solicitor General urged that the District Court's decision in Dupree I be vacated in light of the Court's intervening decision in Clark vs. Roemer. Brief for United States as Amicus Curiae at 13, Dupree vs. Moore, 117 L. Ed. 2d 609 (1992) (No. 90-1977). In addition, the Solicitor General stated that the principles in Clark "lead ineluctably to the conclusion that the [repealer of § 37-7-611] was not precleared when the Attorney General precleared the 'voting changes...as identified in' the State's 1986 letter." United States' Brief at 12-13; see also id. at 16 ("In short, the State's 1986 submission, when measured against the standards set out by this Court in Clark, did not include the repeal of Section 37-7-611."). After noting that the factors upon which the

District Court relied in Dupree I "are essentially irrelevant, as measured by Clark," Brief of United States at 17, the Solicitor General concluded: "Insofar as this Court's opinion in McCain [vs. Lybrand, 465 U.S. 236 (1984),] left any doubt that the premise of the district court's decision [in Dupree I] was incorrect, that doubt was removed by Clark." United States' Brief at 18-19.

The Court vacated Dupree I and remanded for further consideration in light of Clark. On remand, the United States, as amicus curiae, argued that Clark compelled a different outcome in the District Court. In Dupree II, the District Court ruled in favor of the Appellees and the position advanced by the United States. J.S. 3a.

The issues on appeal are not the subject of a conflict among the circuits and do not present a novel or controversial application of the Voting Rights Act. Instead, this appeal is squarely controlled by the Court's 1991 decision in Clark vs. Roemer. The United States has consistently maintained during this case that the State failed to comply with the standards set out in Clark.

III. Conclusion

For the foregoing reasons, the Appellees respectfully request that the Court summarily affirm the District Court's decision without inviting the Solicitor General to express the views of the United States.

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September 2, 1994

Nos. 94-66 and 94-82

Supreme Court, U.S.
FILED
SEP 26 1994
OFFICE OF THE CLERK

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On Appeal From The United States District Court For The Southern District Of Mississippi

SUPPLEMENTAL BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

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September 26, 1994

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ARGUMENT

I. THERE IS A SUBSTANTIAL ISSUE AS TO PRECLEARANCE UNDER THE VOTING RIGHTS ACT.

The central issue involved in this case is whether the State of Mississippi clearly identified the change in the law governing municipal annexations as one of the changes to be precleared, pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, by the United States Attorney General in 1986. Contrary to the Appellees' argument (See Supplemental Brief in Support of Motion to Affirm of September 2, 1994), that is a substantial question. The substantial nature of the question presented is conclusively shown by the fact that the decision below was split 2 to 1, (See Lamar County's Jurisdictional Statement of July 11, 1994, at pp. 2-3) and the Mississippi Supreme Court has disagreed with the majority of the three-judge court below, *Greenville Public School District v. Western Line Consolidated School District*, 575 So.2d 956 (Miss. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1512, 117 L.Ed.2d 649 (1992). Indeed, if one were to count "judicial heads" at this time, the State's position would win. Thus, this is hardly a case where there is no substantial basis for the argument on appeal.

II. SCHOOL DISTRICTS NEED GUIDANCE AS TO HOW TO ABIDE BY THE LAW.

As the Appellees, the Board of Trustees of the Hattiesburg Public School District, themselves recognize (Supplemental Brief in Support of Motion to Affirm, p. 3) the issue presented is important to "every city and county school district in Mississippi . . . ". However those

districts do not know what the law is. *Matter of City of Horn Lake*, 630 So.2d 10, 24 (Miss. 1993) (Impact on voting must be considered in reasonableness of annexation); *Enlargement of Boundaries of Yazoo City v. City of Yazoo City*, 452 So.2d 837 (Miss. 1984); *Matter of Boundaries of City of Jackson*, 551 So.2d 861 (Miss. 1989); *In the Matter of the Enlargement of the Corporate Limits of the City of Hattiesburg*, 588 So.2d 814, 826 (Miss. 1991) ("there was a good school close by"). On the one hand, the Mississippi Supreme Court has ruled that the 1986 law was precleared. *Western Line, supra.* The United States Supreme Court declined to review that decision, even after the Court had issued its opinion in *Clark v. Roemer*, 500 U.S. 646 (1991). On the other hand, the majority of the three-judge district court in this case has ruled, with one dissent, that the 1986 law was not precleared. The school districts and state courts in Mississippi, therefore, are entitled to a fully informed decision from the United States Supreme Court that will finally resolve the issue.

III. THE DECISION BELOW IS NEITHER CORRECT NOR COMPELLED BY *CLARK V. ROEMER*.

The three-judge district court held that the State did not adequately identify the change in the law because the State did not submit a copy of the repealed law. The then-applicable administrative regulations, however, did not require such a submission. Thus, the decision below is neither correct nor compelled by *Clark v. Roemer, supra.*

CONCLUSION

The Motion to Affirm should be denied and this Court should enter an order noting probable jurisdiction.

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September 26, 1994

(5) (5)

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Supreme Court, U.S.
FILED
MAR 24 1995
OFFICE OF THE CLERK

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On Appeal from the United States District Court for the Southern District of Mississippi

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SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO AFFIRM

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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

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SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO AFFIRM

I. Introduction

In its brief, Amicus Curiae United States urges remand of this case to address the question of the severability of the non-voting aspects of Miss. Code Ann. § 37-7-611 from the voting aspects of the statute. U.S. Br. at 19. The United States presumes the District Court failed to consider the specific arguments made by the parties regarding the appropriate remedy for the State's violation of the Voting Rights Act. Remand is unnecessary because this issue has already been presented to the District Court, although not in precisely the same form suggested by the United States.[1]

II. In The District Court, The Appellants Argued That The Court's Remedy Should Be Limited To The Voting Aspects Of Section 37-7-611.

In Dupree II, the District Court held that "[t]he repealer of Miss. Code Ann. § 37-7-611 is hereby found to be ineffective and unenforceable." J.S. App. 37a. In a Rule 59 motion, the Appellants requested the District Court to limit its remedy to the voting features of § 37-7-611 and not disturb the non-voting features of the statute. In response, the Appellees pointed out that, if the District Court did not hold

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[1] The issue actually posed to the United States by the Court concerned the effect of the Mississippi Supreme Court's decision in Greenville Public Sch. Dist. vs. Western Line Consol. Sch. Dist., 575 So. 2d 956 (Miss. 1990), cert. denied, 112 S. Ct. 1512 (1991), on the District Court's ability to fashion a remedy for the State's violation of the Voting Rights Act. The United States' position on that issue is unequivocal: "Greenville Public School District has no effect on the remedy that the federal court may order in this case." U.S. Br. at 15.

the entire statute ineffective, the remedy would be inconsistent with the purposes of the Voting Rights Act. If the entire statute is not ineffective, newly annexed city residents would be precluded from voting in county school board elections, even though they reside in the county school district, send their children to county schools and pay taxes to support the county schools in an amount determined by the county school board.

The United States characterized this potential remedy as "highly unusual" and "sufficiently anomalous" that the state legislature may not have intended it. U.S. Br. at 19. Thus, the United States acknowledged the "strong argument that the non-voting aspects of the repeal of [§ 37-7-611] are not sensibly severable from the voting change effected by that repeal." Id. at 18. As a result, the United States concluded that the District Court's remedial order "may well have been correct." Id. at 19. A review of the parties' positions in the District Court reveals that the substantive issue that would be addressed on remand was actually before the District Court.

Prior to the District Court's August 1993 decision in Dupree II, the State of Mississippi raised the remedy issue in the event that court held that the State failed to receive preclearance of the repeal of § 37-7-611. Citing Dotson vs. City of Indianola, 514 F. Supp. 397 (N.D. Miss. 1981), aff'd mem., 456 U.S. 1002 (1982), the State argued that "only the election features of the statute should be enjoined." State Defendants' Brief on Remand (filed June 17, 1992) at 3.[2] The State asserted that the "ultimate relief" sought by the Appellees is "the establishment of their entitlement to territory for taxation purposes and an increase in student enrollment.

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[2] The United States also cited Dotson in its brief. U.S. Br. at 16.

The state defendants submit that relief of this sort will not flow from any finding of a Section 5 violation herein." Id.

The State previously made this same argument during the preclearance process. In denying the State's request for reconsideration of his objection to the repeal of § 37-7-611, the Attorney General specifically rejected the State's position "that the changes in the procedure for extending municipal school district boundaries do not have any racial aspect but rather simply reflect an ongoing contest among school districts for students and tax base." J.S. App. 219a. The Attorney General affirmed his earlier conclusion that "the repeal of [§ 37-7-611] will essentially freeze municipal school districts in their present boundaries, which, in many instances," will have racial implications regarding the population of school districts. Id. The suggested remedy advanced by the Appellants is totally at odds with the express position of the Justice Department. In addition, their proposed remedy is likely unconstitutional. See Kramer vs. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (cited in U.S. Br. at 18 n.9.).

After the District Court issued Dupree II, the Appellants filed a Joint Motion for Remedy. Citing Dotson again, the Appellants argued:

> [T]he appropriate remedy under Section 5 of the Voting Rights Act of 1964 is limited to a voting remedy, i.e, the school districts' boundaries remain where they are and have been, but the persons annexed may not change their manner of voting. That is, the school districts would remain where they are, but the citizens annexed in

> Lamar County and Forrest County would not be allowed to vote for the County School Boards.

J.S. App. 235a. In reply to this Joint Motion, the Appellees stated that the District Court's remedy -- the repealer of § 37-7-611 is ineffective and unenforceable -- is consistent with this Court's precedent. Plaintiffs' Reply to Defendants' Joint Motion for Remedy (filed Sept. 29, 1993) at 2-3; see Clark vs. Roemer, 500 U.S. 646, 652-53 (1991) ("If voting changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes."); NAACP vs. Hampton County Election Comm'n, 470 U.S. 166, 175 n.19 (1985) ("[S]tatutes that are subject to § 5 are ineffective as laws until they have been cleared by federal authorities."). Addressing the Appellants' contention that residents of the county school district be precluded from voting in county school board elections, the Appellees raised exactly the same points that led the United States to label as "highly unusual" the remedy proposed by the Appellants. Plaintiffs' Reply Memorandum at 3.

In addition, the Appellees noted that the Appellants' proposed remedy did not resolve the basis for the objection of the Attorney General to the repeal of § 37-7-611. The newly annexed city residents would remain residents of the county school district but elect indirectly the board members of the city school district by voting in city elections. Id. at 3-4. The Appellants' proposed remedy would, in effect, veto the Attorney General's objection to the repeal of § 37-7-611 and achieve indirectly what could not be achieved directly.

In its rebuttal brief in support of the Joint Motion for Remedy, Appellant Forrest County School District requested

that the District Court "fashion a remedy which alleviates the voting concerns, but which also allows the non-voting legislative objectives . . . to be enforced by this Court and others." Forrest County School District's Rebuttal Memorandum in Support of the Defendants' Joint Motion for Remedy, Joint Motion for a New Trial, or to Alter or Amend Order and Joint Motion for a Stay Pending Appeal (filed Oct. 15, 1993) at 10 [Forrest County Rebuttal Memorandum]. Appellant Lamar County School District echoed this argument: "[T]he proper remedy is an effect on voting, not an effect on the political boundaries of the school system." Lamar County Rebuttal Memorandum (filed Oct. 22, 1993) at 4.

Forrest County also noted the "two possible voting remedy scenarios." Forrest County Rebuttal Memorandum at 9-10. Under one scenario, the boundaries of the school districts would remain the same and newly annexed city residents would be precluded from voting in county school board elections. Under the other scenario, the school district boundaries would not change and the annexed residents would be precluded from voting in city elections. Id. The Appellees pointed out that "under either scenario, the newly annexed residents would be prevented from voting for officeholders who could impose taxes directly on those residents." Plaintiffs' Reply to Defendants' Joint Motion for Remedy at 3.

III. In Substance, The Severability Issue Was Decided By The District Court.

Having been presented on the one hand with specific arguments by the Appellants that the District Court's remedy should be limited solely to the voting features of § 37-7-611 and, on the other hand, with the Appellees' request that the statute be enjoined its entirety, the District Court denied the

Appellants' Motion for Remedy. J.S. App. 1a. This holding is entirely appropriate because the voting change in issue is the provision in § 37-7-611 that mandates the automatic expansion of school district boundary lines after an annexation by the district's parent city.

In fact, the Appellants' proposed remedy, under which newly annexed residents would be precluded from voting in county school board elections, even though they live in the county district, send their children to county schools and pay taxes to support the county schools, does not take into account this voting change. The Justice Department has consistently viewed the change in school boundary lines to be the central focus of this case. J.S. App. 183a, 217a. In its 1992 brief on appeal, the United States concluded that "[t]he voting change effected by [the repeal of § 37-7-611]--the repeal of the automatic annexation provision of Section 37-7-611--was not identified in the 1986 submission." Brief of United States as Amicus Curiae at 15, Dupree vs. Moore, 117 L. Ed. 2d 609 (No. 90-1977). The three-judge panel and the State have viewed the automatic extension provision as the voting change in issue. J.S. App. 6a, 61a-63a, 164a.

The United States suggests the District Court's decision was affected by the knowledge that the movement of school district boundary lines in this case would be determined by the federal court supervising Hattiesburg's desegregation decree. See Br. at 17 n.8. Precisely because of the presence of the federal court's supervisory authority over the district's desegregation decree, the Appellees have not asked that the three-judge District Court hearing this Voting Rights action move school boundary lines. But, by moving school district boundary lines, the three-judge panel would not exceed its authority because, as noted above, the voting change in issue concerns school boundary lines.

By failing to comply with the Voting Rights Act, the State is precluded from enforcing the repeal of the automatic extension provision in § 37-7-611. Thus, but for the existence of the Hattiesburg District's desegregation decree, the three-judge panel could order that school boundary lines be moved. This remedy, more than the remedy pressed by the Appellants, serves the purposes of the Voting Rights Act.

Moreover, the Appellants' proposed remedy would paradoxically bring about the very result condemned by the Justice Department as racially discriminatory. In his March 31, 1989 objection letter, the Attorney General concluded that "the repeal of Section 37-7-611, by allowing for annexations to cities without the concomitant expansion of municipal school district boundaries, is likely to create a class of city voters (for the most part predominantly white) who will not reside in the city school system yet may vote for the city governing body which under Mississippi law, appoints the city school board." J.S. App. 185a.

The determination of the appropriate remedy in this case confirms the Court's view that in Voting Rights Act cases the "local district court is in a better position than this Court to fashion relief, because the district court is more familiar with the nuances of the local situation." Clark vs. Roemer, 500 U.S. at 659. In addition, the District Court's remedy here "implements the mandate of § 5 in the most equitable and practicable manner and with least offense to its provisions." Id. at 660.

IV. Conclusion

This litigation among several public bodies in Mississippi is now well into its fifth year. This appeal is the third trip to this Court. With deference to the United States, remand is unnecessary because the District Court has already

been presented with the substantive issue the United States contends should be addressed on remand. The Appellees respectfully request that this Court summarily affirm the judgment of the District Court.

RESPECTFULLY SUBMITTED,

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March 24, 1995

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FILED
MAR 29 1995
OFFICE OF THE CLERK

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March 28, 1995

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I. THE SOLICITOR GENERAL OVERLOOKS SERIOUS ARGUMENTS ON THE MERITS OF THE SECTION 5 PRECLEARANCE ISSUE, WHICH ARGUMENTS RENDER THE PRECLEARANCE ISSUE SUBSTANTIAL

The Solicitor General takes the contradictory positions that (1) state courts have an important role in deciding voting rights issues[1] (2) but that the factually and legally parallel *Greenville Public School District v. Western Line Consolidated School District*, 575 So.2d 956 (Miss. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1512, 117 L.Ed.2d 649 (1992), does not constitute any precedent for the lower federal courts in voting cases. The Solicitor General urges that *Western Line* is not binding on "federal" Section 5 issues and further is subject to doubt because of the vacillation of the decision below, since on the appeal the three-judge court has reversed its previous decision and now holds that Mississippi's repealer of Section 611 has not been precleared. This observation by the Solicitor General (Brief of Solicitor General, p. 14, p. 14, n. 4) regarding the progress of the decision below does nothing to propel the argument forward in answer to this Court's question.

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[1] On page 19, note 10, the Solicitor General suggests the remedy question could be certified to the Mississippi Supreme Court. "Those proceedings would be directed to the question of the severability of the non-voting aspects of Section 611 from the voting aspects of the statute. If there is some means to obtain a definitive resolution of that issue as a matter of state law from state courts, the district court may want to make use of it."

This case presents, and this Court has directed the Solicitor General to answer, a substantial question regarding state law impact on Section 5 preclearance. School districts able to litigate in state court will be governed by the Mississippi State Supreme Court's decision in *Western Line*. Those unfortunate enough to end up in federal district court will be governed by the opposite holding on remand of the three-judge district court below. The Solicitor General does not address the heart of the question proposed by this Court and the question lurking after the decision in *Growe v. Emison*, ___ U.S. ___, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993), where this Court held that a State has primacy in the redistricting domain under Section 2 of the Voting Rights Act. Should this state primacy also exist under Section 5? The Solicitor General posits no solution for the collision of State and federal decisions in this Section 5 voting context. This question is substantial.[2] (See the Jurisdictional Statement of the Lamar County Board of Education, et al., pp. 16-18).

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[2] Further in summarizing Judge Barksdale's dissent on the merits below, the Solicitor General omits mentioning Judge Barksdale's holding that preclearance was effected because the United States Justice Department " . . . regulations then in effect *did not require* covered jurisdictions to submit a copy of the prior law being amended or repealed," 28 C.F.R. §51.25 (1986), "but that the current regulation requires '[a] copy of any ordinance, enactment, order or regulation embodying the voting practice that is proposed to be repealed, amended or otherwise changed.' " 28 C.F.R. §51.27 (1992). J.S.App. 33a.

II. THE REMEDY FOR A VOTING RIGHTS VIOLATION BELOW, IF ANY, IS ENJOINING THE NON-PRECLEARED VOTING CHANGE. THE ISSUE IS NOT WHETHER CHANGE AFFECTING VOTING IN A PARTICULAR STATUTE IS SEVERABLE FROM THE OTHER CHANGES OF THE STATUTE.

The Solicitor General argues that "the remedial determination in . . . " this "case depends on whether the portion of the statute that is not invalid is severable, as a matter of state law, from the portion that is invalid." (p. 15) That statement is followed by a citation candidly beginning with "Cf.", "e.g.", and a string cite. The Solicitor General does cite precedent of this Court directly on point, *Dotson v. City of Indianola*, 521 F. Supp. 934 (N.D. Miss. 1981), *aff'd mem.*, 456 U.S. 1002 (1982).

Dotson comes from the State of Mississippi. The City of Indianola had annexed several large land areas, without obtaining preclearance. The three-judge district court held as a matter of law that the annexation would not be rolled back. The remedy would be that the persons in the annexed areas could not vote in city elections until the annexations had been precleared.

Here, the City of Hattiesburg has undergone many annexations into the Lamar County School District's geographic area. If those annexations are valid, as with *Dotson*, persons in the annexed areas would continue attending school in and paying taxes to the pre-annexed area Lamar County Schools, but would lose their right to vote in Lamar County School elections. In the identical situation, *Dotson's* severability was not discussed, and this Court affirmed injunctions restricting only the right to vote of citizens in the newly annexed areas.

Here, if there is a Section 5 violation, the remedy is to enjoin Lamar County citizens living within the Hattiesburg city limits from voting in Lamar County School Districts. Their children may continue attending the Lamar County Schools and their tax money will support the Lamar County Schools, just as was done in *Dotson*. The question regarding remedy is substantial. Based on *Dotson*, this Court should resolve the remedy issue and remand with directions to the three-judge district court.

The argument of the Hattiesburg School District in its Second Supplemental Brief in Support of Motion to Affirm that "in substance" the severability issue was decided by the district court is without any support of record. In its opinion, the three-judge district court did hold that "[t]he repealer of [Section 611] is hereby found to be ineffective and unenforceable." J.S.App. 37a. The Defendants promptly moved for a new trial, to alter or amend the court's order, or for a remedy. J.S.App. 227a-232a, 233a-238a. Without discussion, the district court summarily denied the Defendants' motions. *Id.* Section 1a, 2a. The Solicitor General supports Lamar County's position that the district court gave the plaintiffs a declaratory judgment, and not an injunction, and so is inadequate as a remedy. (Brief of Solicitor General, p. 17, n. 8). The Solicitor General argues therefore a remand is necessary to create an injunctive remedy. *Id.*

CONCLUSION

This District Court's determination that the repeal of Section 611 was not precleared and not repealed by implication is inconsistent with precedent of the highest court of the State of Mississippi, inconsistent with then existing federal regulations, and should be reversed. In the alternative, if this Court finds Section 611 was not precleared, this Court should follow its precedent in *Dotson* and hold that the appropriate remedy is one that affects voting, that is, annexed residents in Lamar County cannot vote in Lamar County School District elections.

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March 28, 1995

Supreme Court, U.S.
FILED
MAR 14 1995
OFFICE OF THE CLERK

Nos. 94-66 and 94-82

In the Supreme Court of the United States

OCTOBER TERM, 1994

MIKE MOORE, ET AL., APPELLANTS

v.

JOHNNY DUPREE, ET AL.

LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, ET AL., APPELLANTS

v.

JOHNNY DUPREE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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24 pp

QUESTION PRESENTED

In light of the Mississippi Supreme Court's holding in *Greenville Public School District* v. *Western Line Consolidated School District*, 575 So. 2d 956 (Miss. 1990), cert. denied, 112 S. Ct. 1512 (1992), that Miss. Code Ann. § 37-7-103 (1972 & Supp. 1990) supersedes Miss. Code Ann. § 37-7-611 (1972) and repeals it by implication, what remedy, if any, can a federal court offer for failure to preclear Section 47 of the Education Reform Act, 1986 Miss. Gen. Laws ch. 492, which also purported to repeal § 37-7-611?

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OCTOBER TERM, 1994

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v.

JOHNNY DUPREE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This submission responds to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

This case is before the Court for a second time. It involves the question whether the State obtained preclearance from the Attorney General under Section 5

of the Voting Rights Act of 1965, 42 U.S.C. 1973c, for certain statutory changes affecting voting that were a part of legislation the State enacted in 1986. It also involves the question of what remedies a federal court may order for the State's failure to obtain such pre-clearance.

1. Prior to 1986, Mississippi law provided for two entirely different ways in which municipal school district boundaries could be altered.

First, municipal school district boundaries could be enlarged "non-consensually" when the city in which the district was located annexed territory from a neighboring political unit. Under the relevant pre-1986 statute—Miss. Code Ann. § 37-7-611 (1972) (Section 611)—when a city with a municipal school district annexed territory from the same or a neighboring county, the municipal school district automatically expanded to become coextensive with the new city limits. This expansion occurred as a matter of law, regardless of the consent of the relevant county board of education or school board of the district losing the territory. See J.S. App. 10a-11a & n.6.

Second, municipal school district boundaries could also be enlarged (or diminished) "consensually," when both the county board of education and the municipal school district board agreed on the change. See Miss. Code Ann. § 37-7-103 (1972) (J.S. App. 122a). In such cases, no municipal annexation or other change to any other political boundary would be involved.

Under Mississippi law, the school board of a municipal school district is ordinarily chosen by the city's elected governing body. Miss. Code Ann. § 37-7-203 (1990). Members of non-municipal school district boards, on the other hand, are ordinarily directly elected by county voters. Miss. Code Ann. § 37-7-207 (1990).

2. In 1986, the state legislature enacted the Uniform School Law, S.B. No. 2117, 1986 Miss. Laws ch. 492, omnibus legislation revising the entire state education code. Among the many changes effected by this statute, Section 47 of the new statute specifically repealed 23 provisions of state law, including Section 611's provision for non-consensual enlargement of municipal school district boundaries upon a city's annexation of territory. J.S. App. 121a. In addition, Section 52 of the new statute (J.S. App. 122a-123a) made some amendments to the consensual system for school district boundary changes provided for in Miss. Code Ann. § 37-7-103.

3. In July, 1986, the Attorney General of the State of Mississippi submitted the Uniform School Law to the Attorney General of the United States for preclearance under Section 5. J.S. App. 12a. The State's submission included a copy of the new statute, a letter from the state attorney general, and a 467-page, loose-leaf notebook entitled "Senate Bill Number 2117—Comparison of Current and New Law." *Id.* at 78a, 93a-152a.

The state attorney general's letter stated that the "'Mississippi Uniform School Law of 1986' * * * is submitted * * * in its entirety." J.S. App. 81a. The letter continued: "For the sake of brevity, the submission will only set forth the particular sections which deal primarily with voting rights even though the complete act is submitted for review." *Ibid.* Thirteen of the 205 sections in the bill were discussed in the letter. The loose-leaf notebook contained the text of every provision of the Uniform School Law, together with photocopied pages containing the provisions of prior state law, if any, that were to be amended by each provision.

a. The State's letter did not discuss Section 47, which repealed Section 611. J.S. App. 13a. The text of Section

47 consists entirely of a statement that 23 cited provisions of state law—including Section 611—that "provide for the creation and operation of municipal separate school districts[] are hereby repealed." *Id.* at 121a. Although the accompanying notebook included the text of Section 47, it did not include the texts of the 23 provisions to be repealed.

b. The State's letter did discuss Section 52, which amended the method of altering school district boundaries with the consent of the school boards involved. The letter explained that Section 52 changed existing law by allowing any school board to engage in mutually agreed-upon transfers of school district territory with adjacent districts, including municipal school districts, without the consent of the county school board, as previously required. J.S. App. 83a. In describing Section 52, the letter did not mention Section 611 of the old law in this connection. The loose-leaf notebook accompanying the letter compared the text of Section 52 with the text of the statutory provision it replaced. *Id.* at 122a-123a. The notebook did not otherwise explain the effect that the enactment of Section 52 had on existing law.

On August 29, 1986, the Assistant Attorney General for Civil Rights, acting on behalf of the Attorney General of the United States (see 28 C.F.R. 51.3), informed the State that the Attorney General did "not interpose any objection to the voting changes occasioned by [the Uniform School Law] as identified in your July 22, 1986, letter." J.S. App. 14a, 156a.

4. More than one year later, on December 30, 1987, the State expressly and separately submitted the repeal of Section 611 by Section 47 of the Uniform School Law for preclearance to the Department of Justice. J.S. App. 158a-168a. The submission explained that Section 47

repealed Section 611, and it outlined the nature of that change. In distinguishing Section 47 from Section 52, the submission stated:

> *It is the automatic expansion of the school district which has been repealed by the instant submission.* The option to expand, however, is not forclosed [*sic*]. Section 52, of the Chapter 492 of the 1986 Laws of Mississippi (precleared by the United States Justice Department on August 29, 1986) provides that the school board of any school district may abolish such existing district or reorganize, change or alter the boundaries of any such school district.

Id. at 164a (emphasis added). In response to the submission, the Attorney General requested additional information from the State, which was ultimately provided. On March 31, 1989, the Attorney General interposed an objection to the repeal of Section 611. *Id.* at 183a-186a. The State asked the Attorney General to reconsider his objection. *Id.* at 187a-216a. On May 25, 1990, the Attorney General advised the State that the objection would not be withdrawn. *Id.* at 217a-221a.

5. After the enactment of the Uniform School Law, J.S. App. 6a, the City of Hattiesburg, Mississippi, annexed neighboring territory in Forrest and Lamar Counties, by filing a petition for annexation in state chancery court and obtaining a favorable ruling on that petition. See Miss. Code Ann. §§ 21-1-27 *et seq.* (1990 & Supp. 1994). On February 23, 1990, plaintiffs—residents and voters of the City of Hattiesburg and members of the Board of Trustees of its municipal school district—filed this suit in the United States District Court for the Southern District of Mississippi pursuant to Section 5 of the Voting Rights Act of 1965, naming as defendants the State of Mississippi and its governor and attorney

general. J.S. App. 46a-47a. Plaintiffs sought, *inter alia*, to enjoin enforcement of the 1986 Uniform School Law, insofar as it repealed Section 611.[1] After a three-judge court was convened, the two affected county school districts (those of Lamar and Forrest Counties) and their trustees intervened as defendants. *Id.* at 47a. The United States filed a brief as amicus curiae in support of plaintiffs, arguing that the repeal of Section 611 had not been precleared and that it therefore could not go into effect. *Id.* at 47a n.2.

On April 2, 1991, the three-judge district court held that the Attorney General had precleared the 1986 repeal of Section 611 when he failed to interpose any objection to the State's 1986 submission. J.S. App. 45a-73a. The court refused to enjoin enforcement of the repealer of Section 611 and gave judgment for the defendants. *Id.* at 72a.[2]

6. While this federal court suit was pending, the question whether the repeal of Section 611 had been precleared was also being litigated through the state court system. On December 12, 1990, the Mississippi Supreme Court decided *Greenville Public School District* v. *Western Line Consolidated School District*, 575 So. 2d 956 (1990), cert. denied, 112 S. Ct. 1512 (1992). In that case, which did not involve the Hattiesburg school district, the Mississippi court held that it had

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[1] The result of the requested injunction would be that Section 611 would remain in effect. As a consequence, Hattiesburg's annexation of neighboring territory from Forrest and Lamar Counties would result in that territory automatically becoming part of the Hattiesburg municipal school district.

[2] The result of this decision was that the territory annexed by Hattiesburg did not become part of the Hattiesburg municipal school district, but remained part of the county school districts to which it belonged prior to the annexation.

concurrent jurisdiction with local, three-judge federal district courts to determine whether the repeal of Section 611 had been precleared pursuant to Section 5 of the Voting Rights Act. 575 So. 2d at 959.

On the merits, the state court agreed with the three-judge district court's holding that the repeal of Section 611 had been precleared in 1986. The state court held that the Attorney General had in effect precleared the repeal of Section 611 when he precleared Section 52. According to the state court, "[e]ven assuming [Section 611] was not specifically repealed [by Section 47], it was implicitly repealed by [Section 52]." 575 So. 2d at 963. In the state court's view, Section 52 was "a subsequent enactment covering a field of operation co-existent with [Section 611]" that "cannot by any reasonable construction be given effect while the prior law remains in existence because of irreconcilable conflict between the two acts." *Ibid.* In that situation, the court held, a "repeal * * * arise[s] by necessary implication from the enactment of a subsequent act." *Ibid.*

7. An appeal of the three-judge district court's initial decision in this case reached this Court at approximately the same time as did the petition for a writ of certiorari from the Mississippi Supreme Court's decision in *Greenville Public School District.* This Court vacated the judgment of the district court and remanded "for further consideration in light of *Clark v. Roemer*, 500 U.S. [646] (1991)." *Dupree* v. *Moore*, 112 S. Ct. 1462 (1992) (see J.S. App. 74a). The Court denied certiorari in *Greenville Public School District.* 112 S. Ct. 1512 (1992).

8. On remand, the three-judge district court held that the State's submission of the 1986 Uniform School Law had not presented to the Attorney General for preclearance either of the two provisions of that Act (Sections 47 and 52) identified by the State as having

repealed Section 611. The court relied on *Clark* v. *Roemer*, 500 U.S. 646 (1991), which had held that "any ambiguity in the scope of a preclearance request must be resolved against the submitting authority," *id.* at 656, and that a State "must identify with specificity each change that it wishes the Attorney General to consider" in a Section 5 preclearance submission, *id.* at 658.

Applying those principles, the district court held that when the State submitted the Uniform School Law in 1986, the State had clearly and unambiguously submitted only those 13 sections it specifically had identified in its submission as affecting voting. J.S. App. 20a. Because the State had not specifically identified Section 47, which expressly repeals Section 611, the voting change contained in that section was held not to have been properly submitted.

With respect to Section 52, the court recognized that the State had specifically identified Section 52 in its initial Section 5 submission in 1986. But, the court noted, the State's 1986 submission did not explain that Section 52 had any effect on Section 611. The Attorney General accordingly could not have known at the time of the submission that Section 52 repealed Section 611 "by implication." Thus, the district court held that that "implicit repeal" was not submitted under Section 5 and, consequently, had not been precleared. J.S. App. 20a-21a & n.10. The district court concluded that to "permit Mississippi to submit a haystack of documents and obligate the Attorney General to painstakingly search for any voting change needle" would be inconsistent with the "clear pronouncement" of this Court in *Clark*. *Id.* at 22a. Accordingly, the court held that "[t]he repealer of [Section 611] is hereby found to be ineffective and unenforceable" unless and until the State obtains preclearance. *Id.* at 37a.

Circuit Judge Barksdale dissented. J.S. App. 23a-34a. In his view (*id.* at 25a-26a), the facts surrounding the initial attempt to preclear Mississippi's 1986 Uniform School Law were distinguishable from those in *Clark* and its precursor, *McCain* v. *Lybrand*, 465 U.S. 236 (1984), because the State here sent a copy of the actual legislation for which preclearance was sought with its request for preclearance. J.S. App. 29a. In Judge Barksdale's view, the submission therefore at least put the Attorney General on notice of the existence of the two sections that repealed Section 611. *Id.* at 30a-33a. For that reason, Judge Barksdale would have ruled that the repeal of Section 611 was adequately submitted and precleared because no timely objection had been interposed by the Attorney General.

9. Defendants moved the district court for a new trial, to alter or amend the court's order, or for a new remedy. J.S. App. 227a-232a, 233a-238a. They alleged, *inter alia*, that the court had failed to render judgment "upon the whole case or for all the relief asked," *id.* at 234a,[3] and that the court should have fashioned relief that would have precluded only the voting change effected by the repeal of Section 611, while permitting the balance of the repeal of Section 611 to go into effect. See *id.* at 228a-229a, 234a-235a. In practical terms, granting defendants' motion apparently would have meant that the children in the area annexed by Hattiesburg would continue to go to school in their pre-annexation, county school districts and that the residents of the annexed area would continue to pay school taxes to those pre-annexation districts, while the residents of the annexed area would lose their right to vote for the county school board to

[3] In fact, the district court failed to enter a separate judgment, as required by Fed. R. Civ. P. 58.

which they paid taxes and whose schools their children attended. The district court summarily denied defendants' motion. *Id.* at 1a-2a.

DISCUSSION

This Court has requested the United States to address the following question:

> In light of the Mississippi Supreme Court's holding in *Greenvil'e Public School District* v. *Western Line Consolidated School District*, 575 So.2d 956 (Miss. 1991), that Miss. Code Ann. § 37-7-103 (1972 & Supp. 1990) supersedes Miss. Code Ann. § 37-7-611 (1972) and repeals it by implication, what remedy, if any, can a federal court offer for failure to preclear section 47 of the Education Reform Act, 1986 Miss. Gen. Laws ch. 492, which also purported to repeal § 37-7-611?

In *Greenville Public School District*, the Mississippi Supreme Court held that Section 52 of the Uniform School Law implicitly repealed Section 611. 575 So. 2d at 963. That ruling conclusively determines the effect of Section 52 on Section 611 as a matter of state law. See J.S. App. 20a-21a & n.10. Since the repeal of Section 611 would be a change in law affecting voting in a covered jurisdiction, however, it must be precleared before it can be enforced; that is true whether the repeal is by implication (as with Section 52) or is done explicitly (as in Section 47). We therefore agree with the district court that any voting change caused by the repeal of Section 611 may not be enforced, and the district court's ruling on the merits in this case should therefore be summarily affirmed. The repeal of Section 611, however, has important state law consequences other than its effect on voting. The repeal determines the schools that children in the area annexed by Hattiesburg attend and

the school district to which residents of the annexed area pay taxes. These non-voting consequences create a significant remedial issue that in our view warrants a remand to the district court for further proceedings.

1. Mississippi is a jurisdiction that is covered under Section 5 of the Voting Rights Act. Accordingly, before the State may put into effect any state law that makes a change affecting voting, it must either obtain pre-clearance from the Attorney General of the United States or it must bring an action in the United States District Court for the District of Columbia, seeking a declaration that the new state law "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. 1973c. If the Attorney General fails to interpose an objection, or if the State obtains the declaratory judgment, the State may put the new law into effect. If neither of those events occurs, the State may not.

In this case, the State did not seek judicial preclearance of the repeal of Section 611. Since the repeal of Section 611 would be a change in state law affecting voting, the enforceability of the repeal, insofar as it affects voting, therefore depends on whether the Attorney General ever precleared it. If the Attorney General precleared the repeal of Section 611, then the State may enforce that repeal and cease to apply Section 611. That would be true regardless of whether the Attorney General precleared the "express" repeal of Section 611 (by Section 47 of the Uniform School Law) or the "implied" repeal of Section 611 (by Section 52 of the Uniform School Law). But if the Attorney General did not preclear either the express repeal or the implied repeal of Section 611, then the State may not put any voting change effected by that repeal into effect.

The district court in this case correctly ruled that neither the express nor the implied repeal of Section 611 had ever been precleared. That conclusion follows from this Court's decision in *Clark*. In *Clark*, the district court had held that certain voting changes made by earlier enactments and never submitted for preclearance were in effect precleared when the Attorney General precleared later legislation incorporating the earlier changes. This Court held, however, that the preclearance of the later legislation did not operate to preclear the earlier changes, because the State had never identified the earlier changes in the preclearance papers it submitted to the Attorney General. The Court ruled that "a submission pertains only to *identified* changes in that legislation" and that "any ambiguity in the scope of a preclearance request must be resolved against the submitting authority." 500 U.S. at 656 (emphasis added).

In this case, the State's initial 1986 Section 5 submission of the Uniform School Law to the Attorney General failed to identify Section 47 as a provision that made a voting change; the only information provided concerning the effect of Section 47 was the statutory language stating that it repealed prior provisions that "provide for the creation and operation of municipal separate school districts." J.S. App. 121a. That statement did not refer to any voting change. The State thus did not "identify with specificity," *Clark*, 500 U.S. at 658, that Section 47's repeal of Section 611 made a voting change. Moreover, "any ambiguity in the scope of a preclearance request must be resolved against the submitting authority." *Clark*, 500 U.S. at 656 (citing *McCain*, 465 U.S. at 257). Since the State's submission could not be found to have unambiguously identified the voting change effected by the repeal of Section 611, the

Assistant Attorney General's letter, stating that he did "not interpose any objection to the voting changes occasioned by [the Uniform School Law], as identified in [the State's] July 22, 1986, letter," J.S. App. 156a, did not operate to preclear the repeal of Section 611.

As the district court in this case correctly held, the same conclusion follows with respect to what the Mississippi Supreme Court in *Greenville Public School District* termed the "implied repeal" of Section 611 that occurred when Section 52 of the Uniform School Law was enacted. Although the text of Section 52 (unlike the text of Section 47) was submitted as a voting change, the explanation of that change was that it provides for alteration of school district boundaries—including municipal school district boundaries—with the consent of the school boards involved. See J.S. App. 83a. Since nonmunicipal school boards are elected, the alteration of their boundaries is a change affecting voting. *Perkins* v. *Matthews*, 400 U.S. 379 (1971). Nothing in the text of Section 52 or in the State's submission, however, stated that Mississippi law had previously provided in Section 611 for nonconsensual expansion of municipal school district boundaries, or that the new method provided for in Section 52 would preclude the application of Section 611 and would henceforth be the *sole* method for altering school district boundaries. Therefore, as the district court held, "even if Section 52 in effect amounted to a repeal of [Section 611] by operation of state law, that fact was not submitted to the Attorney General in 1986 nor reviewed by him as such." J.S. App. 20a-21a.

The district court's conclusion that Section 611 was not repealed insofar as it affects voting conflicts with the conclusion reached by the Mississippi Supreme Court in *Greenville Public School District* that Section 52 impliedly repealed Section 611 and that Section 52's

effect on voting *was* precleared under Section 5 of the Voting Rights Act. The Mississippi Supreme Court has the last word on the meaning of Section 52 as a matter of state law. But it does not have the final word on the interpretation of Section 5 of the Voting Rights Act or on the effect of Section 5 on the attempted repeal of Section 611, both of which are issues of federal law. As we explained in our submission to this Court in response to its invitation in the *Greenville Public School District* case itself, a state court decision does not constitute binding precedent on the lower federal courts on a question of federal law. See 90-1861 U.S. Br. 17-18. See also *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 483 (1942).[4] It would be particularly inappropriate to recognize any such final state court authority over an issue of federal law where, as here, Congress has expressly provided that three-judge federal district courts be the forum for the litigation of the federal issue involved.[5] Nor could the Mississippi Supreme Court's ruling in *Greenville Public School District* have any res judicata effect on the plaintiffs in this case, who were not

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[4] In addition, the Mississippi Supreme Court decided *Greenville Public School District* prior to this Court's clarification of the governing legal standards in *Clark*, so that its precedential weight would in all events be subject to doubt.

[5] Section 5 provides that "[a]ny action under this section shall be heard and determined by a court of three judges * * * and any appeal shall lie to the Supreme Court." 42 U.S.C. 1973c. We recognize that this provision does not preclude a state court from deciding a Section 5 coverage issue that is collateral to an action otherwise properly before it. See *Hathorn* v. *Lovorn*, 457 U.S. 255 (1982). As we stated in our submission to this Court in *Greenville Public School District*, however, there is substantial doubt that the state court had jurisdiction to decide the Section 5 coverage issue in that case, since it was not merely collateral to a state-law claim otherwise before the court. See 90-1861 U.S. Br. 15-19.

parties there. See *Hathorn* v. *Lovorn*, 457 U.S. 255, 269 n.23 (1982). Accordingly, the Mississippi Supreme Court's decision in *Greenville Public School District* has no effect on the remedy that the federal court may order in this case.

2. There remains the question of what remedies may be ordered by the three-judge district court for the State's failure to obtain preclearance of the repeal of Section 611. Section 5 requires preclearance of changes affecting voting in covered jurisdictions. *Connor* v. *Waller*, 421 U.S. 656 (1975) (per curiam); *United States* v. *Board of Supervisors*, 429 U.S. 642, 645 (1977) (per curiam). Therefore, "[i]f voting changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes," *Clark*, 500 U.S. at 652-653, at least absent "extreme circumstance[s]" of a sort not present here, *id.* at 654.

Where, as in this case, an unprecleared law operates to make both a change affecting voting and a change that does not affect voting, the question of how to fashion a remedy becomes more complex. In this kind of case, the Section 5 court is in much the same position as a court that has found a portion of a state statute to be unconstitutional or otherwise invalid as a matter of federal law. The remedial determination in such a case depends on whether the portion of the statute that is not invalid is severable, as a matter of state law, from the portion that is invalid. Cf., *e.g.*, *United States Dep't of Treasury* v. *Fabe*, 113 S. Ct. 2202, 2212 & n.8 (1993); *Wyoming* v. *Oklahoma*, 502 U.S. 437, 459-461 (1992); *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750, 772 (1988); *Weaver* v. *Graham*, 450 U.S. 24, 36 n.22 (1981); *Railroad Retirement Bd.* v. *Alton R.R.*, 295 U.S. 330 (1935); *Williams* v. *Standard Oil Co.*, 278 U.S. 235,

241 (1929). If it is severable, the court should issue relief directed to the invalid portion (here, the voting change) and permit other portions of the statute (here, the non-voting changes in state law made by the statute) to go into effect. See *Dotson* v. *City of Indianola*, 514 F. Supp. 397, 403 (N.D. Miss. 1981), aff'd mem., 456 U.S. 1002 (1982). If the court finds that the valid portion of the statute is not severable, the court should direct its relief to operation of the entire statute.

The repeal of Section 611 changed state law in ways that affected voting, because it altered the school district in which people living in areas annexed by a city would vote.[6] Had there been no repeal, people living in the annexed areas would no longer vote in their pre-annexation school district, since the area in which they live would no longer be part of that district. Under the repeal, however, they would continue to vote in the pre-annexation school district, since (absent the consent of both districts involved) they would still live in it.

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[6] Appellants in No. 94-82 claim (J.S. 13-14) that plaintiffs in this case—members of the Hattiesburg school board and voters in Hattiesburg—lack standing. As we understand it, appellants assert that plaintiffs were not injured by the failure to preclear the repeal of Section 611 because plaintiffs' votes will be unaffected by the only remedy to which they would be entitled in this case—an order that those living in the annexed territories will no longer be able to vote in elections for the school board of their pre-annexation school district. As we explain below, however, it is possible that broader relief than this would be appropriate. See pp. 18-19, *infra*. Plaintiffs also claim that some city voters are being permitted to vote in the pre-annexation, county school districts as well as in city elections, while other city voters can vote only in city elections, and they seek a remedy to redress that alleged inequality. See, *e.g.*, *Heckler* v. *Mathews*, 465 U.S. 728, 738 & n.4 (1984) (citing cases).

But the repeal of Section 611 also changed state laws in significant ways that did *not* affect voting. Had there been no repeal, children in an area annexed by a municipality would attend the city's schools and residents of the annexed area would pay taxes to support those schools.[7] Under the repeal (and, again, absent the necessary consent), the children in the annexed area would continue to attend schools operated by the pre-annexation school district and residents in the annexed area would continue to pay taxes to the pre-annexation school district. Those effects on school attendance and taxation are not themselves changes in state law affecting voting. It would therefore be theoretically possible to implement the non-voting changes made through the repeal of Section 611 (the changes in school attendance and taxes) while not implementing the voting changes. If this were done, the annexed area would remain in the county school districts for all purposes except voting.

The district court in this case held that "[t]he repealer of [Section 611] is hereby found to be ineffective and unenforceable." J.S. App. 37a.[8] That holding appears to

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[7] With regard to taxation, Mississippi law generally provides that a minimum education tax, supplemented by an additional amount authorized by the school board, be imposed on property within a school district and be paid to the school district. See Miss. Code Ann. §§ 37-57-1, 37-57-105 (1990 & Supp. 1994).

[8] In this case, it appears that the district court gave plaintiffs only a declaratory judgment—not an injunction—as a remedy. That may well have been because the Hattiesburg school district is operating under a continuing desegregation order, and the city school board must obtain the permission of the desegregation court before it may change its boundaries. See 94-66 J.S. 29 n.10; 94-66 & 94-82 Mot. to Aff. 18 n.6. The basic remedial principles set forth in the text, however, apply equally to injunctions and declaratory judgments. If the non-voting effects of the new law are severable,

constitute a conclusion that the repeal of Section 611 is unenforceable in its entirety. Before reaching that conclusion, however, the district court should have determined whether the non-voting changes effected by the repeal of Section 611 were—as a matter of state law—severable from the voting changes.[9] There is no indication in the district court's opinion that it undertook such a determination. (Although the issue was raised by appellants in their motions to alter or amend the order, the district court summarily denied those motions.) Therefore, we agree with appellees that this case should be remanded to the district court with instructions to determine whether the repeal of Section 611 should be declared invalid in its entirety, or whether the repeal of Section 611 should be declared invalid only insofar as it affects voting, permitting the pupil assignment and taxation issues to be governed by the new state law.

We do not mean to suggest that a conclusion that the repeal of Section 611 should be unenforceable in its entirety was incorrect. There is, in fact, a strong argument that the non-voting aspects of the repeal of Section 611 are not sensibly severable from the voting change effected by that repeal. If the non-voting aspects

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the district court should issue a declaration that only the voting aspects of the repeal of Section 611 may not be enforced. If the non-voting effects of the new law are not severable, the district court should issue a declaration that the entire repeal of Section 611 is not enforceable.

[9] There may also be federal constitutional issues that would be raised if a State decided not to permit residents of a school district to vote in school board elections. See *Kramer* v. *Union Free School District No. 15*, 395 U.S. 621 (1969). The district court would of course have to take any such issues into account in determining the severability issue.

of the repeal were permitted to proceed, but the voting change was not enforceable, the citizens of the annexed territories would be left in a highly unusual position. They would continue to send their children to the schools run by their pre-annexation, county school boards and they would continue to pay property taxes to support those schools, but they would be unable to vote for membership on those school boards. That situation would be sufficiently anomalous that it could lead to a conclusion that the state legislature would not have intended it—*i.e.*, that the non-voting aspects of the repeal of Section 611 are not severable from the voting aspects.

Although the district court's remedial order thus may well have been correct, we think that, in the absence of any reason to believe that the district court engaged in any analysis of the severability issue, it would be appropriate to remand the case to the district court for further remedial proceedings. Those proceedings would be directed to the question of the severability of the non-voting aspects of Section 611 from the voting aspects of the statute. If there is some means to obtain a definitive resolution of that issue as a matter of state law from the state courts, the district court may want to make use of it.[10] In the absence of any such means, the district court, which sits in Mississippi and whose judges must regularly address state-law issues in other contexts, is

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[10] Rule 20 of the Rules of the Mississippi Supreme Court provides for certification of questions of law to that court "from the [United States] Supreme Court or * * * any United States Court of Appeals." Although this rule does not provide for certification requests from a federal district court, no provision of state law expressly precludes acceptance of a certified question from such a court.

in the best position to make that determination in the first instance.

CONCLUSION

The district court's determination that the repeal of Section 611 was not precleared is controlled by this Court's decision in *Clark* v. *Roemer* and should be summarily affirmed. The case should be remanded to the district court for further remedial proceedings to inquire into whether, as a matter of state law, the non-voting aspects of the repeal of Section 611 are severable from the effects on voting of the repeal of Section 611.

Respectfully submitted.

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MARCH 1995